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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 92

WALTER P. GARDNER, Trustee of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT, STATE OF NEW JERSEY.

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November 27, 1946.

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Petitioner,

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STATE OF NEW JERSEY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT, STATE OF NEW JERSEY.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 152 Fed. (2d) 408. It is printed in the Record (pg. 148). The opinion of the District Court of the United States for the District of New

Jersey, confirming the Special Master's Interim Report (R. 27), which was reversed by the Circuit Court of Appeals, is not officially reported but appears in the Record (pg. 40).

II.

JURISDICTION.

The petitioner has stated that the jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 938; USCA Tit. 28, Sec. 347. The State of New Jersey has not denied the power of this Court to entertain the review in the instant case.

III.

STATEMENT OF THE CASE.

On August 14, 1944, the Trustees of the Debtor, in reorganization under Section 77 of the Bankruptcy Act, filed a petition entitled "Petition for Adjudication Concerning New Jersey State Tax Claims and for Order No. 250," which we shall hereinafter refer to as the petition of August 14 (R. pg. 43). That petition prayed (R. pg. 62):

> "that this Honorable Court, the premises considered, may promptly adjudicate (1) whether petitioners entered into a contract with the State of New Jersey, (2) whether such contract is binding on the parties thereto, (3) whether, if not binding on the State, petitioners are nonetheless bound by the prejudicial actions taken by them, (4) if not binding on the parties thereto including petitioners, to what extent, if at all, the proofs of claim of the State of New Jersey should be allowed, (5) what order should in such event be made to restore the equivalent of the status quo ante as nearly as may be and (6) what in such event are the relative rights, claims, liens and priorities of the

claimants in the assets of the Debtor's Estate; and that this Honorable Court may instruct petitioners whether to make on or before December 1, 1944, the additional payment on account of the taxes claimed and the additional interest payment required by Chapter 290 of the Laws of 1941, as amended by Chapter 241 of the Laws of 1942."

Being of the opinion that the Bankruptcy Court was wholly without jurisdiction to entertain such petition for the reason that (1) there is no power in the Bankruptcy Court summarily to review the matters and make the determinations or adjudications requested by said petition, and that, even if there were such power (2) the making of such determinations and adjudications concerning liens of the State affixed at the time of bankruptcy constitutes a suit against the State which may not be maintained without the State's consent, the State of New Jersey appeared specially and moved to dismiss the said petition of August 14.

The Bankruptcy Court's finding that the requisite jurisdiction did exist was reversed by the Circuit Court of Appeals in *In re Central Railroad of New Jersey*, 152 F. (2d) 408. That judgment is before this Court for review upon application of the Trustee of the Debtor, hereinafter referred to as the Petitioner.

To understand the questions presently before this Court and in order to determine the applicability of the several sections of the Bankruptcy Act to the matters presently in controversy, a detailed statement of the prior litigation is deemed necessary.

A. *Concerning the litigation with respect to the assessment of the 1932 to 1939 taxes.*

The current controversy concerning the assessment methods employed by the taxing authorities in the State of New Jersey actually began with the review of the 1931

assessments. The New Jersey Supreme Court denied a request for a reduction in the 1931 assessments in *Central Railroad Company of New Jersey* vs. *State Board of Tax Appeals,* 109 N. J. L. 395. The New Jersey Court of Errors and Appeals affirmed this judgment (112 N. J. L. 5) and certiorari was denied by this Court (293 U. S. 568). The 1931 taxes have been paid.

The Debtor appealed its 1932 assessments to the State Board of Tax Appeals. The assessments were affirmed after hearing. No application was made to the New Jersey Supreme Court for a review of that judgment.

The Debtor appealed its 1933 assessments to the State Board of Tax Appeals. These assessments were affirmed after hearing. The Debtor was then granted a review of the 1933 assessments by the New Jersey Supreme Court. On December 11, 1934, the Supreme Court affirmed the judgment of the State Board in *Central Railroad Company* vs. *Martin,* 114 N. J. L. 69.

No appeal was taken to the New Jersey Court of Errors and Appeals from such judgment, but instead this Debtor and certain other railroad companies brought suit in the United States District Court for the District of New Jersey, seeking a permanent injunction against the collection by the State of New Jersey of a portion of the taxes assessed against them for the years 1932 and 1933. The dismissal by the District Court of their application was affirmed by the Circuit Court of Appeals in *Lehigh Valley Railroad Company* vs. *Martin,* 100 F. (2d) 139, decided November 15, 1938. Application for certiorari was denied by this Court on April 19, 1939 (306 U. S. 651, rehearing denied 306 U. S. 669).

Thereafter, the Attorney-General of New Jersey started proceedings to enforce the State's lien for taxes for the said years 1932 and 1933. According to the Trustees' petition of August 14, the Attorney-General's action forced the filing of the Debtor's "Petition in Bankruptcy" (R. pg. 45 (4)).

Notwithstanding that all questions concerning the amount of the 1932 and 1933 taxes had been determined adversely to the Debtor and notwithstanding that the bankruptcy act gave power to the Trustees to borrow on Trustees' certificates, in a market which this Court will judiciously notice was asking a very low interest rate, the Trustees continued to resist the collection of the said taxes and allowed further interest to accumulate at 1% per month from October 30, 1939, which condition existed at the time of the argument below and continued to exist on April 18, 1946, when the Petition for Certiorari was filed in this Court.

On April 26, 1946, a very substantial payment was made in order to stop the running of some portion of the interest. Reference to the Record (pg. 298) will show that the State did not intend to waive its immunity or to relinquish any other right except as specifically set forth in Order No. 333. (R. pg. 296.) An impossible situation had been created by reason of the inability of the parties to devise a formula which would protect the State and at the same time permit this Debtor to make a payment in a way to stop the running of some portion of the said interest amount, particularly in view of the fact that the said Debtor had millions of dollars in cash in the bank or in negotiable bonds. The Bankruptcy Court of its own motion had called many conferences to determine some formula, reference to one of such in September, 1944, being mentioned by the Honorable Judge in the Record (pg. 307). It is worthy of note that the bondholders who have filed a brief amici curiæ in this cause, hereinafter called the bondholders, urged the payment of the said sum (R. pg. 316).

It is hard to believe that the petitioner in the instant case would seriously advance the argument that the State had intended to waive any right or that it had not adequately protected its position when it accepted payment pursuant to the terms of the said Order No. 333. Before

the Court was even presented with the Order the learned Judge said (R. pg. 317):

> "I now rule that I intend and will recommend payment; the amount is open until the coming in of the presentation of an order after counsel have examined it, and then if there are objections to that order I will hear them. I want to finish this today, time is money in this case."

Reading this in the light of the testimony presented at the said hearing wherein an exhibit was introduced entitled "Elements of Value of the Physical Property of the Central Railroad Company of New Jersey Based Upon Interstate Commerce Commission Calculations" on the basis of which the fixed property in New Jersey is valued at $123,248,161.00 (R. pg. 303), and the equipment allocatable to New Jersey at $36,093,044.00, it becomes apparent that the payment was made in order to protect the equity of the bondholders and others in the railroad properties obviously valued far in excess of the State's tax liens.

Notwithstanding what had been said by the New Jersey courts in the 1931 and 1933 cases, and by the Circuit Court of Appeals with reference to the combined 1932 and 1933 cases, nevertheless this Debtor and other railroad companies appealed their 1934, 1935 and 1936 assessments to the State Board of Tax Appeals. No reviews of the judgments of the State Board for the years 1934, 1935 and 1936 were sought from the New Jersey Supreme Court in the manner provided by statute, but the said Debtor and the other railroad companies again resorted to the Federal Courts. The United States District Court entered a decree enjoining the collection of more than 60% of the 1934, 1935 and 1936 assessments until a revaluation of the property should be made by the State taxing authorities in conformity with the opinion of the said District Court. This was

later increased to 70%. Upon appeal by the State, the judgment was reversed in *Central Railroad Company* vs. *Martin*, 115 F. (2d) 968, decided November 27, 1940.

The Circuit Court of Appeals in reversing the judgment in the last mentioned case held that all questions concerning the assessment methods employed in connection with the 1934, 1935 and 1936 taxes had been made res judicata by *Central Railroad* vs. *Martin*, 114 N. J. L. 69, *supra*,—by the judgment of the New Jersey Supreme Court in connection with the 1933 assessments.

By their petition of August 14, the Trustees deny that they were a party to the appeal before the United States Circuit Court of Appeals. Reference to the record in that case will show, however, that the Debtor did appear in the proceedings and that the injunction running against the State and to the said Debtor was dismissed. The Circuit Court of Appeals issued its mandate to the District Court specifically setting aside the decree in favor of this Debtor. It is worthy of observation that the reported case shows that counsel in the Circuit Court of Appeals' case was one of those whose name appears upon the brief in the present action. A copy of the mandate is shown in the appendix to this brief (pg. 147) as well as a notice filed by the Petitioner in the Bankruptcy Court on December 27, 1945 (App., pg. 149) concerning such mandate.

The Debtor did not apply for certiorari to review this judgment. The New York, Susquehanna and Western Railroad Company, a party to the proceedings before the Circuit Court of Appeals and which is also under Section 77 reorganization proceedings, likewise did not seek certiorari. Judge Clark, who sat in the New York, Susquehanna and Western case, said with reference to further proceedings concerning such taxes, as reported in 36 Fed. Supp. 158, 160:

> "We insist upon a proscription of futility."

All of the other railroad companies, with the exception of the two just mentioned, sought certiorari from this Court which was denied on April 28, 1941 (313 U. S. 568).

Again we call attention to the fact that notwithstanding what was said in that case, a large amount of 1934, 1935 and 1936 taxes were still due to the State of New Jersey at the time of the filing of the petition for certiorari in this case.

The Debtor and other railroad companies appealed their 1937 and 1938 assessments, which were at exactly the same level as the 1936 assessments, to the State Board of Tax Appeals. The two years were heard as a unit and an aggregate of 4,610 pages of testimony were taken and 450 exhibits were introduced into evidence. The assessments were affirmed by the State Board on May 13, 1941. Since the identical assessing method was employed, *Central Railroad* vs. *Martin*, 115 F. (2d) 968, *supra* must be controlling and it must be the law of these latter years that all questions concerning the assessment method for such years had likewise been made res judicata by *Central Railroad* vs. *Martin*, 114 N. J. L. 69, *supra*. *Tait* vs. *Western Maryland*, 289 U. S. 620, 624, and *Central Railroad Co.* vs. *Martin*, 115 F. (2d) 968, 973, *supra*.

It was not the passage of the "Settlement Acts" which caused the railroads to refrain from again resorting to the certiorari procedure provided by our statutes or to the Federal Courts in the manner set forth above as alleged by the Petitioner. They had exhausted every remedy that promised even a possibility of success and were confronted with the situation which caused the learned Judge in the *Susquehanna* case to make the classic remark concerning a "proscription of futility." (36 Fed. Sup. 158, 160.)

The Debtor appealed its 1939 assessment to the State Board of Tax Appeals. In that year the State Tax Commissioner made primary valuations substantially the same as those in 1938. On a review of the primary assessment

provided by statute, the State Tax Commissioner made adjustments downward on water-front property. Appeals were taken from the final determination of the State Tax Commissioner by the Debtor seeking a further reduction and by the City of Jersey City seeking to have the assessments increased. The State Board of Tax Appeals dismissed the Debtor's appeal and restored the assessments to the level of the 1938 assessments. The Trustees were notified of these decisions by letter dated June 15, 1942. Thereupon the Trustees obtained from the United States District Court an order upon the State taxing authorities and the Attorney-General to show cause why the judgment of the State Board of Tax Appeals should not be declared null and void. After hearing, the District Court entered Order No. 171, whereby it was determined that the Debtor's tax liability for 1939 had been definitely fixed by Order No. 163, which had in turn fixed the assessment for 1939 at the lower level. This order was reversed by the United States Circuit Court of Appeals in *In re Central Railroad Company of New Jersey*, 136 F. (2d) 633, 640. An application for a writ of certiorari from this Court was denied (320 U. S. 805).

The above covers all of the tax years prior to bankruptcy, including the year 1939, for which last-mentioned year the taxes did not become in default until December 1, 1939, over one month after bankruptcy.

B. *Concerning the Tax Settlement Acts litigation.*

Notwithstanding the termination of the litigation for the tax years 1932 to 1936, all adversely to the claims of the Debtor and other railroad companies by the judgment in the *Central Railroad* vs. *Martin*, 115 F. (2d) 968, *supra*, on November 27, 1940, large amounts of taxes for those years still remained unpaid in July, 1941. The Legislature of the State of New Jersey compelled by the concerted refusal of the railroad companies to pay millions of dollars in taxes

due and payable to the State of New Jersey, adopted Chapter 290 of the Laws of 1941, whereby it was sought to forgive the several railroad companies their obligation to pay back interest and to permit the payment of the principal amount of the taxes over a period of years plus 3% interest on the unpaid balance from December, 1940. This Act and Chapter 241 of the Laws of 1942, which is amendatory thereof, are designated as the "Tax Settlement Acts."

The 1941 Act provided in Sections 7 and 8, for the participation by the Attorney-General in the tax settlement scheme as follows:

> "7. Undertaking; first payment. Any railroad or system or the receiver, trustee or trustees thereof, may enter upon the execution of an installment payment plan authorized under this act by (1) duly executing and filing with the State Comptroller a written undertaking, in such form as the Attorney-General shall prescribe, for the payment of the total amount of delinquent taxes owed by the railroad or system and (2) paying into the State treasury an amount not less than the first annual installment together with interest on the unpaid balance computed in the manner provided by sections two, three and four of this act.
>
> "8. Waivers. The first payment tendered pursuant to this act shall be accompanied by a waiver of any and all rights to contest the legality or amount of any assessment made prior to December first, one thousand nine hundred and forty-one, together with stipulations, consents or other papers for the discontinuance and dismissal of all suits, actions, and proceedings pending in any court or before the Board of Tax Appeals concerning such assessments, all in such form as the Attorney-General may require."

The Attorney-General being of the mind that the Act was unconstitutional refused to give his consent and instead on September 4, 1941 (barely six weeks after the passage of the Act), filed an information in the Court of Chancery of New Jersey seeking a determination as to the constitutionality of the first Settlement Act.

The railroad companies seeking to obtain the benefits afforded by the said Act regardless of the refusal of the Attorney-General to participate in the settlement machinery, discontinued certain pending further appeals of their 1937 and 1938 taxes but not in the manner provided by the said Act. From the above statement concerning prior litigation, it can be seen that such discontinuance was a matter of form only as there was no meritorious questions left to be litigated since all questions had been held to have been made res judicata by *Central Railroad* vs. *Martin*, 115 F. (2d) 968, 973. As was said in *Wilentz* vs. *Hendrickson*, 135 N. J. Eq. 244, 260, with respect to any further litigation for such years:

> "• • • the asserted rights of the railroad taxpayers are 'illusory,' rather than real."

But of greater significance is the fact that there was no requirement for the several railroad companies to pursue the course which they did. A reading of the original Settlement Act discloses that there was no necessity of discontinuing the several suits in the manner chosen. It was only required that discontinuance documents be filed with the fiscal officers of the State in the form approved by the Attorney-General. Since he had refused to approve the form, no such documents could therefore have legally been received at that time. Thereafter, when the 1942 Amendment (P. L. 1942, Chapter 241) took effect the injunction of the Chancery Court immediately issued and the Treasurer again was powerless to accept the tender of such docu-

ments by reason of such injunction. (136 F. (2d) 633, 638.) Had the several railroad companies been of the notion that there was anything of merit left to litigate, they would have tendered the documents in the manner prescribed by the terms of the Settlement Acts, and then would have gone to the New Jersey courts and asked for leave to keep open their appeals pending the determination by the New Jersey courts of the question of constitutionality.

Notwithstanding that the several railroad companies did not seek to intervene in the tax settlement controversy and were not parties to such litigation, the record discloses that the matter was strongly litigated, the Attorney-General on the one hand urging the unconstitutionality of the Acts and the State Treasurer on the other, through eminent counsel, urging the constitutionality of such Acts. (133 N. J. Eq. 447; 135 N. J. Eq. 244.) Not only this but the Legislature of New Jersey sought to cure obvious constitutional deficiencies by the adoption of the amendatory act in May, 1942 (Chapter 241 of the Laws of 1942), during the pendency of such litigation.

On May 21, the very day the amendatory act was enacted into law, under which the participation of the Attorney-General was eliminated, an injunction issued out of the New Jersey Court of Chancery restraining the State fiscal officers from accepting any payment or otherwise performing the terms of the Settlement Acts. On July 20, 1943, the Court of Chancery determined the Settlement Acts to be unconstitutional (*Wilentz* vs. *Hendrickson*, 133 N. J. Eq. 447). The New Jersey Court of Errors and Appeals affirmed the decree of the Chancery Court on June 22, 1944. (135 N. J. Eq. 244.)

In the meantime and on June 2, 1942, the Trustees petitioned the District Court for instructions with reference to their compliance with the Settlement Acts. As a result of such petition, the Trustees were instructed and directed to comply with the said Settlement Acts and Order No. 163

was entered fixing the amount due to the State of New Jersey for taxes and interest at the amount that was provided by the terms of the said Settlement Acts. The State of New Jersey appealed to the United States Circuit Court of Appeals for the Third Circuit. On May 27, 1943, the said Court reversed the said Order No. 163 and held that the District Court in the exercise of a nice discretion should have withheld any determination as to the constitutionality of the Settlement Acts pending the determination of such question by the New Jersey Courts (136 F. (2d) 633). It is significant that the Circuit Court of Appeals made its determination prior to the judgment by the New Jersey Court of Chancery and in plenty of time for the Trustees to have applied to intervene in the New Jersey Settlement Acts litigation. A rehearing was denied on July 15, 1943, still prior to July 20, 1943, the date of the judgment by the Chancery Court. It should likewise be pointed out that the Trustees had more than one year from May 27, 1943, until June 22, 1944, when the Court of Errors and Appeals made its final determination, within which to intervene in the Settlement Acts' controversy.

The Trustees, by their petition of August 14, now seek to have the Bankruptcy Court make an adjudication that a binding contract exists with the State of New Jersey upon the basis of their abortive attempts to comply with the terms of the unconstitutional Settlement Acts. This contention was disposed of adversely to the Trustees in *In re Central Railroad Company of New Jersey*, 136 F. (2d) 633, 638, *supra*, wherein the Court said:

> "The final contention that the issue between the State and the Trustees is moot by reason of the tender to the Treasurer of a payment pursuant to Order No. 163 must also fail. The tender though acknowledged was not accepted by the Treasurer and consequently was without legal effect. In fact, the Treasurer was

powerless to accept the tender by reason of the injunction issued by the Court of Chancery."

Similar argument to that which is now advanced by the Trustees in connection with the present application was advanced before this Court in connection with an application for a writ of certiorari to review the judgment in the just mentioned case, which application was denied. (320 U. S. 805.)

C. *Concerning the litigation with respect to the August 14 petition.*

Approximately two months after the New Jersey Court of Errors and Appeals made its determination in *Wilentz vs. Hendrickson, supra,* the Trustees filed its petition of August 14, wherein the Trustees sought to have the Bankruptcy Court make certain determinations with respect to the taxes and interest due to the State of New Jersey, as more particularly set forth on page two above.

A reading of the petition of August 14, discloses that the Trustees still seek to have the Bankruptcy Court make a redetermination of the questions decided adversely to themselves in *In re Central Railroad Company of New Jersey,* 136 F. (2d) 633, *supra,* and to adjudicate concerning the constitutionality of a state law declared by the highest court of our State to be wholly unconstitutional. *Wilentz* vs. *Hendrickson,* 135 N. J. Eq. 244. Since this determination the Act has again been held inoperative in *State* vs. *Erie Railroad Co.,* 23 N. J. Misc. 203, in a suit by the State against five major railroad companies. It would seem that the Trustees had sought by the petition of August 14, also to have the Bankruptcy Court redetermine certain tax questions which had been said by the Federal Court to have been made res judicata by the New Jersey Supreme Court in *Central Railroad Company* vs. *Martin,* 114 N. J. L. 69,

supra (R. pg. 47), although they now disclaim any such intent. We are unable to determine whether the disclaimer is because of the action of the courts in the tax litigation or because of a purported compliance with the Settlement Acts. They have requested the Bankruptcy Court to make certain other adjudications but have not shown where the Bankruptcy Act has given jurisdiction to the Bankruptcy Court in such matters.

Since all of the taxes due to the State of New Jersey had become a lien paramount to all other liens upon the lands, tangible property and franchises in the State of New Jersey, not later than June 1, 1939, and over four months prior to October 30, 1939, when the petition for reorganization was filed, the State moved on special appearance to have the said petition of August 14 dismissed insofar as it sought to take jurisdiction for the purpose of making adjudications that would be binding upon the State of New Jersey with respect to the pre-existing tax liens of the said State. The argument of the State concerning the jurisdiction of the Bankruptcy Court was comprised within two broad classifications (1) Congress did not give power to the Bankruptcy Court to undertake the review sought by the Trustees in the instant case with respect to the State's tax liens affixed prior to bankruptcy; and (2) if Congress intended to grant such power, such grant of power is subject to the rule that the consent of the State must be obtained before such power may be exercised, otherwise the grant of power would be unconstitutional.

Over objection of the State, the District Court Judge referred the matter contained in the petition of August 14, including the jurisdictional questions, to the Standing Master for determination and report. The Standing Master made a finding that the Bankruptcy Court did have jurisdiction to entertain the several matters contained in the said petition. Again, over objection of the State, the

District Court Judge confirmed the report of the Standing Master by its Order No. 271.

Believing that neither the Standing Master nor the United States District Judge had fairly met the objection of the State with respect to its claim that the tax liens of the State of New Jersey affixed at the time of bankruptcy were not within the jurisdiction of the Bankruptcy Court, the State petitioned the United States Circuit Court of Appeals for a Writ of Prohibition forbidding and preventing the Court from adjudicating concerning the said tax liens. The efforts of the State to have the jurisdictional question answered are set out in detail in the petition for said writ, set forth at length at page 10 of the *Record and more particularly* from pages 14 through 18. The Circuit Court of Appeals allowed its rule to show cause why the said writ should not issue. Thereafter, the said Court called a conference of counsel representing the respective parties and suggested that the matters contained in the appeal from Order No. 271 and the application for the Writ of Prohibition be consolidated to the end that the specific jurisdictional question with respect to the State's tax liens should be determined. This was done and the Court had before it, when it made its decision, all matters having to do with the appeal from Order No. 271 and the request for the Writ of Prohibition.

The Court below, in reversing Order No. 271, held that it was not necessary to answer the jurisdictional objections set forth in the two broad classifications above because the jurisdiction of the Bankruptcy Court was limited in the manner set forth in *Arkansas Corporation Commission* vs. *Thompson*, 313 U. S. 132 (1941). The Court held, in effect, that even if there be jurisdiction, yet, under the facts of the instant case, such jurisdiction is limited to a determination of whether there was mathematical error in computation, saying (R. pg. 167) that:

"Failure of this opinion to touch upon certain points raised by the State of New Jersey is not to be construed as meaning that they are without merit; rather, our decision renders discussion of them unnecessary."

The Court thereupon reversed Order No. 271 with costs to the State and stated that, since this disposed of the entire matter before them, the application for the Writ of Prohibition should be dismissed without costs to either party. It is clear that the Court determined that all jurisdictional questions had been fully determined and that it was, therefore, unnecessary to consider the issues urged and presented by the State in its application for a Writ of Prohibition.

D. *Concerning matters that have arisen in the Section 77 proceedings.*

The Debtor filed its petition under Section 77 on October 30, 1939. This was done, as stated above, because the Attorney-General was proceeding to perform his statutory duty under New Jersey Revised Statutes 54:28–1, which required that, if a tax shall remain unpaid in whole or in part for ten days after the expiration of the time limited for the payment thereof, the Attorney-General "*shall apply forthwith*" for entry of judgment (App. pg. 136) and by R.S. 54:28–2, wherein it is provided that the Attorney-General "shall apply for an order that execution forthwith issue on the judgment" (App. pg. 137). On November 1, 1939, the Court issued its injunction restraining the said Attorney-General from proceeding to enforce the lien for its 1932 and 1933 taxes in the manner required by law (R. pg. 195).

Subsequent to the institution of the Section 77 proceedings and on November 27, 1940, the Circuit Court of Appeals rendered its decision with respect to the 1934, 1935 and 1936 taxes of the Debtor (115 F. (2d) 968). Thereafter

and on December 15, 1940, the Comptroller filed a proof of claim upon a form submitted by the Trustees as shown on page 64 of the record. On February 27, 1941, the Trustees filed objections to the proof of claim covering all the years 1932 to 1939, notwithstanding that the Circuit Court of Appeals had specifically decided adversely to themselves all questions concerning the 1932 to 1936 taxes and by necessary inference all questions with reference to all the other years. The Trustees in their petition for adjudication of August 14 failed to call to the attention of the Court the reply of the State of New Jersey to the said objections. In that reply (R. pg. 245, par. 12) the following will be found:

> "12. This court has no jurisdiction, power or authority to make a new assessment or tax levy, or to revise or reduce the amount of the assessments or taxes, or any of them, or to abate or reduce the amount of the legal interest which has accrued, or which may hereafter accrue, to date of final payment, upon the amount of taxes in default on any due date, as prescribed by the railroad tax acts of the State of New Jersey.
>
> "Wherefore Claimant prays for the dismissal of said objections, and each of them, and for allowanee of the full amount of each of said claims and interest as set forth in Schedule 'A' attached thereto, respectively, together with interest on said taxes, respectively, at the rate of 1% per month and after December 1st, 1940."

It is obvious from a reading of the record that no responsible official of the State of New Jersey had considered that it was submitting any question concerning the amount due to the State of New Jersey to the Bankruptcy Court. No reasonable person could have felt otherwise than that, when the Circuit Court of Appeals had made its determina-

tion with respect to the 1934, 1935 and 1936 cases, reiterating what had been said with respect to the 1932 and 1933 cases, as reported in *Lehigh Valley Railroad Co.* vs. *Martin*, 100 F. (2d) 139, *supra*, just one year earlier, the only thing left open to the railroad was when it would pay its bill. That apparently was the attitude of the fiscal officials charged with responsibility in such matters.

The Trustee now contends in its brief (pg. 87) that the State has been urging an enlargement of its lien under the new Railroad Tax Act. The Trustee is unable to show one single instance where the State has been insisting that it has a lien other than upon the lands, tangible personalty and franchises of the Debtor.

The Legislature in 1941 sought to ease the tax burden of the several railroad companies by providing a 3% property tax rate in lieu of much higher average rates and local rates in existence under the old law and to supplement this with a franchise excise tax based upon net operating income (Chapter 291 of the Laws of 1941). That the new law does, in fact, effect a very substantial saving to the Central Railroad Company is borne out by the case of *Jersey City* vs. *State Board of Tax Appeals*, 133 N. J. L. 202, wherein because of the reduction in taxes for the year 1941 to the several railroad companies, including this Debtor, the Act was declared to be unconstitutional with respect to that year only. This judgment was reversed by the Court of Errors and Appeals in *Jersey City* vs. *Kelly*, 134 N. J. L. 239. The additional cost to the Trustee for 1941 taxes alone would have been in excess of one million dollars. (App. pg. 152.)

We point this out to show that any complaints that the Debtor may now have with respect to assessments under the new Act come in ill grace considering that the legislation was adopted for the purpose of helping the several railroads which had been complaining of the tax burden during times of poor earnings. Because of the new fea-

tures of the Act, which no longer provided for a property tax upon franchises, it became necessary to change the terminology of the Act. However, it is clear from Section 54:29a–74 of the Act that the Legislature never contemplated that there would be any lapse such as is suggested in the argument of the Trustee. By the just-mentioned section, it is provided:

> "This act shall be construed as a revision of chapters nineteen through twenty-nine, inclusive, of Title 54 of the Revised Statutes, and nothing herein shall be construed to affect any pending litigation, nor to repeal, abate, cancel, cause to lapse or otherwise affect in any manner any assessment or the lien or obligation to pay any taxes heretofore assessed to any taxpayer, or the legal authority to collect taxes, interest and penalties which have accrued under any provision of law repealed by this act or under any other law, except as specifically provided in this act * * *."

The Trustees in their brief (pg. 81) claim that the State in accepting some $18,000,000, during the pendency of these proceedings has consented to the jurisdiction of the Court. With respect to the 1939 taxes, these did not become due and payable and in default until December 1, 1939, so that under the rule of *Reconstruction Finance Corporation* vs. *Missouri, Kansas and Texas R. Co.*, 122 F. (2d) 326, C. C. A. 8th 1941, and *Boteler* vs. *Ingels*, 308 U. S. 57 (1939), these quite properly could be treated as a charge against the administration. As for the 1940 taxes, which became due and payable on December 1, 1940, there can be no question but that they were and are an administration charge, which under the law the Trustees were required to pay. The acceptance of current taxes could by no stretch of the imagination be a submission to jurisdiction.

With respect to the payment made this year subsequent to the filing of the petition for certiorari in this cause, we have stated our position above (pg. 5). This payment was made for the sole purpose of stopping the running of interest after the Court had before it testimony to show that the property of the Debtor was worth far in excess of the State's tax liens. The State accepted this sum with the assurance of the United States District Court and the several parties that all questions with reference to jurisdiction remained open as heretofore and that by such acceptance the State was waiving none of its jurisdictional objections.

This leaves open only the payments made with respect to the 1932 and 1933 taxes. Such payments were made after this Court had refused certiorari. The said payments totaling less than $1,000,000 could quite properly be made by the Trustees in order to save the running of interest upon a portion of such amount. The Trustees have not shown where they have been in any wise hurt by such payment and the saving of interest of a substantial portion of such amount clearly warranted the payment by the Trustees. It can hardly be said that the request by the Attorney-General of a sum finally and definitely fixed after extensive litigation and which occasioned the filing of the Section 77 proceedings could be a recognition of jurisdiction with respect to the State's tax liens, particularly since the Attorney-General was enjoined from proceeding with his mandatory duty of enforcing the State's tax liens in the New Jersey Courts, the only Courts open to him by law. *Great Northern Life Insurance Co.* vs. *Read*, 322 U. S. 47. (1944.)

E. *Concerning the application for a Writ of Prohibition.*

Again referring to the application for the writ of prohibition, when the Standing Master made his Interim Report and stated that the Bankruptcy Court has power to determine the amount and validity of the State tax claims

and "the incidental liens alleged to affect the property in the custody of the Court," the State applied to the Circuit Court of Appeals for the said writ to restrain the Bankruptcy Court from undertaking any consideration of the tax liens of the State existing at the time of bankruptcy. The State did this advisedly because of the distinction between pre-existing liens, inchoate statutory liens and unsecured claims. The State has freely admitted that, in an ordinary bankruptcy proceeding, if the Bankruptcy Court first receives the property free of lien, it is incumbent upon the lien-holder to come into the Court in order to establish that lien. By N. J. R. S. 54:28-5 it is provided that on property other than that used for railroad purposes, the State liens do not attach until after the judgment is entered, the same as in the case of any other judgment. If we were now asserting a right to a lien under such section and this were a regular bankruptcy, we would be in the position of an applicant and subject to the bankruptcy act.

Because there was the possibility that, when the case came before an appellate court, the said case might go off on the narrow question of whether or not the Court had the right to determine the amount due upon any claim which we might have to make by reason of such inchoate statutory liens or by reason of a claim against unencumbered assets in the event of deficit, we filed the said Application for a Writ of Prohibition. The petition for such Writ is set forth on pages 10 to 21 of the Record.

The Circuit Court of Appeals, when the matter became ready for argument, called a pre-argument conference at Philadelphia. At that conference the Court suggested that the appeal from Order No. 271 and the Application for a Writ of Prohibition should be argued together to the end that the jurisdictional question in which the State is primarily interested—whether a State with pre-existing tax liens may be compelled against its will to participate in a plan of reorganization or otherwise lose its liens and

whether such pre-existing liens may be made the subject of litigation without such State's consent—might be fairly argued and determined.

The Court in reversing the said Order No. 271 said that it was unnecessary to determine the matters contained in the said petition for the Writ of Prohibition. We respectfully submit that the matter is now before this Court in such manner that the broad jurisdictional question advanced by the State concerning its pre-existing lien may be finally determined. We are in no wise concerned here with the question of the power of the Bankruptcy Court to adjudicate concerning any claim the State might have to make against unencumbered assets in the event of a deficit nor with the assertion of an inchoate statutory lien as provided in R. S. 54:28–5 in the event the State's paramount lien upon the property in railroad use is insufficient to liquidate the tax debt.

SUMMARY OF ARGUMENT.

1. Congress did not intend to include a State having tax liens affixed at the time of the filing of a Section 77 petition as a creditor or claimant in a Section 77 proceeding so that such State could without its consent be made to participate in a plan of reorganization under such section.

2. Congress did not authorize the Bankruptcy Court summarily to adjudicate concerning a State's lien for taxes affixed at the time of the institution of Section 77 proceeding without its consent and such power is not granted by Section 77, Section 64, Section 57 or Section 67 of the Bankruptcy Act.

3. If Congress did intend to grant power to the Bankruptcy Court to compel a State having pre-existing tax liens to participate in a plan of reorganization or to adjudicate summarily concerning saids pre-existing tax liens, such grant of power must be subject to the State's consent otherwise such grant of power is unconstitutional.

4. The State of New Jersey has not authorized any State officer nor is there any statutory authorization showing that the State has consented to participation in a plan of reorganization or has submitted its pre-existing tax liens to the jurisdiction of the Bankruptcy Court.

5. Notwithstanding that Section 64 or any other provision of the Bankruptcy Act may be held to be applicable in Section 77 proceeding, under the rule established by *Arkansas Corporation Commission* vs. *Thompson*, 313 U. S. 132 (1941), the Bankruptcy Court was not authorized to undertake jurisdiction under the facts of the given case.

6. The petitioner has shown no authority for the Bankruptcy Court summarily to adjudicate the several questions presented by the petitioner with respect to the applicability of the so-called Settlement Acts, and no such authority exists either pursuant to State or Federal law.

7. The petitioner has stated that it is "crystal clear" that said petitioner is not questioning the amount and validity of taxes. It necessarily shows that the only matter left for consideration is the constitutionality or applicability of the so-called Settlement Acts. This involves a question of State law. Particularly in view of the fact that the Circuit Court of Appeals has already said that an exercise of nice discretion requires withholding determination on such matters pending the determinations of the New Jersey Courts, it is even more important that, in the exercise of such nice discretion, the Bankruptcy Court should not now entertain the present petition but should refer the whole matter to the State Courts for determination of any State questions still unanswered.

ARGUMENT.

POINT I.

The petitioner has misconceived what constitutes "the estate of a bankrupt in custodia legis" and on the basis of such misconception has confused the several jurisdictional issues.

This point is presented by way of introduction to our argument. We hope thereby so to channelize such argument that the confusion and misunderstanding of same so manifest in the briefs of our opponents here and below may be eliminated or at least minimized.

The fundamental question is of course—Did Congress intend to grant power to the Bankruptcy Court summarily to adjudicate in Section 77 proceedings concerning a State's tax liens affixed at the time of bankruptcy without the State's consent? The answer to that question requires the consideration of several other questions, all advanced by the State below to prove that Congress did not intend to and could not, if it would, grant the power to the Bankruptcy Court to make such adjudications. Several distinct jurisdictional objections have been urged. Neither the petitioner nor the bondholders have answered those objections. They have cited cases indiscriminately concerning jurisdiction in refutation of our argument, although the point involved in a cited case has been freely admitted by us and the said case immaterial to the issue before this Court. This situation has come about because of the failure of our opponents to channelize their argument so as to meet forthrightly each separate jurisdictional question.

With what does Congress deal under the bankruptcy clause of the federal Constitution? In *Kothe* vs. *R. C. Taylor Trust* 280 U. S. 224, 227 (1930), this Court said:

> "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bank-

rupt's estate among creditors holding just demands based upon adequate consideration."

As was said by the Court in *In re Swofford Bros.*, 118 Fed. 549, 556 (D. C. Mis. 1910):

> "It must be remembered that the policy and purpose of all national bankruptcy acts is primarily to secure an equal and speedy distribution of the property of the bankrupt among his creditors. A further object is to relieve the honest debtor from legal proceedings for his debts, and to enable him to have a fresh start in business life; but the distribution of the property is the principal object to be attained—the discharge of the debtor is incidental and subordinate."

Merchants' National Bank 228 U. S. 634 (1913); *Clarke* vs. *Rogers* 228 U. S. 534 (1913), and many other cases support this view.

Ours has not been a static law but a flexible and pliable instrument fully capable of meeting expanding and changing economic and social conditions. In commerce we have had within a few short years the stage coach and covered wagon, the railroad, motor transport and now air transport. And our concept of commerce law has kept pace with such changes and expansion. But always any change in interpretation has been securely anchored to the basic principle of commerce.

And so, in bankruptcy, we have likewise had an expanding and changing concept of the law. Thus in the beginning, the bankruptcy laws were limited to traders and involuntary proceedings. Then were added other persons and voluntary proceedings became lawful. In turn we have seen proceedings for reorganization of railroad companies and other corporations and most recently the expansion of the bankruptcy power to include readjustment of municipal obligations providing there be consent. In all of this ex-

pansion and change, however, Congress has dealt with the affairs of an embarrassed Debtor or bankrupt. The primary purposes of legislation have been with respect to the affairs of a person who cannot meet his or its obligations ex contractu or ex delictu.

With this changing and expanding concept, we have no quarrel just so long as any change deals only with that with which Congress has authority to deal—the estate of the Debtor or bankrupt who cannot meet his obligations. But what is that estate?

We urged below and we again urge that considerable confusion will be caused unless we thoroughly understand what is meant by the term "the estate in custodia legis," and unless we differentiate between (a) the question of jurisdiction over the "estate in custodia legis"; (b) the question of the grant of power to adjudicate concerning pre-existing encumbrances upon an "estate in custodia legis"; and (c) the wholly different question of the power to exercise such jurisdiction in a given case. Proper consideration of the main question thus requires a progressive approach, each step in the progression being carefully shielded if possible from contact with the several other steps in order to avoid the above-mentioned confusion.

A. *Concerning "the estate in custodia legis."*

It has been held repeatedly that the Bankruptcy Court has exclusive jurisdiction of the "estate in custodia legis." But, what is the "estate in custodia legis" at the inception of bankruptcy? Is it the property free and clear of all encumbrances, making it incumbent upon every lienor and every mortgagee to come into the Bankruptcy Court in every bankruptcy to establish his lien or mortgage notwithstanding that prior to the bankruptcy the bankrupt's property was subject to such lien or mortgage? Or is such "estate" the property of the bankrupt subject to such lien or mortgage making it necessary for the bankrupt's trustee to be the moving party in case of controversy?

It is fundamental that a trustee in bankruptcy takes custody of the property of a bankrupt in the same "plight and condition" in which the bankrupt himself held such property at the time of bankruptcy. *Thompson* vs. *Fairbank*, 196 U. S. 516, 526 (1905). A trustee takes any property of a bankrupt subject to whatever liens existed as against the bankrupt. *Rode & Horn* vs. *Phipps*, 195 F. 414 (C. C. A. 6th, 1912). And this is not a modern rule but is a rule of ancient vintage. In Blackstone's Commentaries, Book II, pg. 286, it is stated that the commissioners of a bankrupt took only the equity of redemption in a mortgaged estate. *First National Bank* vs. *Staake*, 202 U. S. 141 (1906) cited by Petitioner does not state a different rule. This Court in that case distinguished the facts but reaffirmed the general rule at page 149.

In *Marshall* vs. *New York*, 254 U. S. 380, 385, this Court said:

> "• • • a receiver appointed by a federal court takes property subject to all liens, priorities or privileges existing or accruing under the laws of the State • • •"

To the same effect is *Atchison, T. & S. F. R. Co.* vs. *Hurley*, 153 Fed. 503 (C. C. A. 8th 1907) aff'd, 213 U. S. 126, citing *Hewitt* vs. *Berlin Machine Works*, 194 U. S. 296, *Thompson* vs. *Fairbank*, supra, *Humphreys* vs. *Tatman*, 198 U. S. 91.

The rule could not be otherwise in view of the history of bankruptcy and the broad purpose of the Bankruptcy Act, as stated by this Court in *Kothe* vs. *R. C. Taylor Trust*, *supra*.

The estate of this Debtor on October 30, 1939, was that which the Debtor actually owned on such date—the Debtor's equity in the properties to which it had title and which it operated. The legal situation is well explained in *In re Tresslar*, 20 F. (2d) 663, 664. (D. C. Ala. 1927.)

"As a proposition of law, I think that a valid lien, whether created by contract or by statute, upon the goods, wares, and merchandise in the hands of the trustees, reduces the estate of the bankrupt to the extent of the amount of the debt secured by the lien. The priority provided in subsection 6 of Section 64 of the Bankruptcy Act does not interfere with the disposition of money or property that does not belong to the bankrupt's estate. It simply directs the administration of the money belonging to the bankrupt's estate, and nothing more. It is the estate of the bankrupt which is administered, and what constitutes the estate is governed by the laws of the state."

Nothing in Section 77 discloses that Congress intended therwise. It is provided by Section 77 (U. S. C. A. 205) (c) (2) that:

"Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provision of this section subject at all times to the control of the judge and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe."

It is inconceivable that Congress intended that the Debtor should on October 29 have a title subject to tax liens, mortgages and other liens and by the simple expedient of the filing of a petition under Section 77 enlarge that estate so that the said Debtor would now have an unencumbered title. In *Continental Bank* vs. *Rock Island*, 294 U. S. 648, 676 (1935), the Court said:

"The injunction here in no way impairs the lien, disturbs the preferred rank of the pledges. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action."

In the just mentioned case, the bank had possession. In ours, the trustee had possession. But there can be no sound basis for distinguishing between the quality of the estate in the two cases. The Debtor continued its possession of just exactly what it had just prior to bankruptcy and handed over to the trustees just that and nothing more.

We may have appeared to have labored this point in view of the statement of the special master on page 16 of his interim report (R. pg. 39), to the effect that the property is in custodia legis subject to the rights of lien-holders. But the master pays only lip service to the rule and then goes on to treat such liens as incidental to demands that he assumes must be made to the trustee in order to establish the right of the State to such lien amounts. The two positions are irreconcilable. The latter position can only be justified on the theory that the trustee in bankruptcy takes the property of a Debtor in the first instance, free and clear of all liens and other encumbrances and that it is incumbent upon lienors, including a sovereign State having liens for taxes affixed at the time of bankruptcy, to establish their rights to their liens in and to such property before the Bankruptcy Court.

This position is not novel, and was passed upon by this Court in *York Mfg. Co.* vs. *Cassell*, 201 U. S. 344, wherein a ruling of the Circuit Court of Appeals that a seizure by the Bankruptcy Court operated as an attachment and an injunction for the benefit of all persons having an interest in the property was reversed. See also *In re Plattville Foundry and Machine Co.*, 147 F. 829 (D. C. Wisc. 1906), where it was said:

"This would seem to follow, indeed, from the rules laid down by the Supreme Court of the United States to the effect that the trustee takes no title to the interest of the lien claimant."

The Special Master overlooked the cases which hold that one having security for his debt may not prove his claim against the estate unless he surrenders his security or first exhausts his security and makes claim for only the resulting deficit. *New York Trust Co.* vs. *Palmer*, 101 F. (2d) 1 (C. C. A. (2d) 1939); *In re Hagin*, 21 F. (2d) 434 (D. C. La. 1927), aff. 33 F. (2d) 563. Regardless of the argument of this petitioner, we do not believe it can successfully be urged that any officer of the State of New Jersey was given the authority to surrender the security which the State has for its tax debt in the instant case and to prove as an unsecured creditor under Section 64 a.

In conclusion of this subpoint, we respectfully urge that the Trustees took title and possession of certain properties used for railroad purposes by the debtor in the State of New Jersey but that such title was and is subject to the State liens for taxes for the years 1932 to 1939, the latest having attached five months prior to bankruptcy. The estate of the debtor was subject to such liens just prior to bankruptcy and the "estate in custodia legis" is the self-same estate.

B. *Concerning jurisdiction of "the estate in custodia legis."*

The State has freely admitted that the Trustee has title to and possession of the property used by the Debtor for railroad purposes in the said State, and that the Bankruptcy Court may do anything necessary to protect that possession and maintain the status quo. Our discussion of the jurisdictional question will be better understood if we state our understanding concerning the assets of a bankrupt.

There are three broad phases or classifications involved in our discussion. *First.* A bankrupt may have unencumbered assets or valuable equities in encumbered assets. By the mere institution of bankruptcy proceedings, such assets are taken into the custody of the Bankruptcy Court and jurisdiction is given to the Court to distribute the sums realized upon such assets to the several creditors pursuant to Section 64. Any claimant, including a State, desiring to participate, must submit to the jurisdiction of the Court. *New York* vs. *Irving Trust Co.*, 288 U. S. 329 (1933), and *Lyford* vs. *City of New York*, 137 F. (2d) 782 (C. C. A. 2nd 1933) are authority only for such rule. *Second.* A bankrupt may have property which is still free of any lien, but against which a State has the right to claim a lien. We have such right in the instant case upon other than property in railroad use. (N. J. R. S. 54:28–5.) In such a case, the Court in the first instance receives the property free of the lien and so obtains jurisdiction of the subject matter of the inchoate lien. In an ordinary bankruptcy proceedings, the Court would have custody of the res and it would be incumbent for a State to assert its right to a lien or take the chance of having its right lost. *Van Huffel* vs. *Harkelrode*, 284 U. S. 225 (1931); *Straton* vs. *New*, 283 U. S. 318 (1931), and *Lyford* vs. *State of New York*, 140 F. (2d) 840 (C. C. A. 2nd 1944) are simply authority for this rule. *Third.* A bankrupt may have property already subject to existing liens. In such a case the Bankruptcy Court takes custody of the property subject to such existing liens and before any binding adjudications may be made concerning such liens the lien-holder must be made a party to the proceedings. In the first two examples the Court operates against the res. In the third, the action must of necessity in the first instance be in personam and subject to the necessity of due process. We are in the third class.

The Bankruptcy Court is fully empowered at all times to protect the equity in the "Third" example. No matter how

valueless the Debtor's interest in a given property may appear to be, the Court, nevertheless, has the power to prevent interference with that interest. But the Court does not operate upon the premise that the said property is unencumbered property. It directs its action upon the equity of the Debtor in such property. As we have said, the purpose is to maintain the status quo, to preserve all equities until such time as it may be determined whether reorganization can be effected and whether a given property or undertaking is essential to such reorganization. *Continental Bank* vs. *Rock Island R. Co., supra; Smith* vs. *Hoboken R. R. Co.*, 66 S. Ct. 947; *Thompson* vs. *Texas Mexican R. Co.*, 66 S. Ct. 937. (1946.)

In the meantime and pending such determination, the State may dispose of its interest or do anything else short of foreclosing its lien. On its part, the Debtor may dispose of a given property subject to the State's lien. In short, anything may be done by either that does not affect the said status quo. Of course, the State may be damaged by the exercise of such power by the Trustee but in such case there would be presented a situation where the interest of the State would have to give way to the paramount right of the Federal Government. It is not denied, that as long as the Bankruptcy Court is acting properly to protect the equity of the Debtor in the said property, it is acting within the limits of the bankruptcy power and the right of the State to enforce its lien for taxes is subordinate to that power. It is our purpose to show that as long as the State is willing to await the outcome of such determination and does not press enforcement in the Bankruptcy Court, the State can not be made to come into a Section 77 proceedings without its consent.

When the Bankruptcy Court made its order No. 3 whereby, on November 1, 1939 (R. pg. 195), the Bankruptcy Court enjoined the Attorney-General from proceeding with the collection of the 1932 and 1933 taxes as out-

lined above (pg. 17), the State took no appeal. It admitted and admits jurisdiction to that extent. Since we have never denied jurisdiction in such a case, *In re Tyler*, 149 U. S. 164 (1893), *Ex parte Baldwin*, 291 U. S. 610 (1934), and other similar cases, throw absolutely no light on the jurisdictional issues, as we understand such issues, but instead tend only to confuse such issues.

In conclusion of the subpoint we submit that in the present discussion we are not at all concerned with the extent of power of the Bankruptcy Court with respect to the equity of the Debtor in the certain properties. With respect to that, the Bankruptcy Court's power is broad and comprehensive. As we stated above at page 23, we are not concerned with any eventual claim for a deficit against unencumbered assets, nor are we concerned with the perfecting of an inchoate statutory lien under R. S. 54:28-5. We are concerned only with pre-existing statutory liens for State taxes and the extent of jurisdiction concerning such pre-existing liens.

C. *Concerning the jurisdictional questions which are vital to the issues of our case.*

What then are the real jurisdictional questions involved? Again we are confronted not with a single question but a series of questions pertinent to the fundamental issue of jurisdiction presented by the facts of the instant case. Those questions are comprised within two broad categories: (1) jurisdiction of subject matter and (2) the power to exercise jurisdiction in a given case, involving the subject of process. Again consideration of the two categories must be kept separate and distinct unless we would fall into confusion. Clarity demands that cases be not indiscriminately cited as authority for the combined powers when it must be apparent that grant of power and the exercise of power in a given case are separate and distinct things. Obviously

if Congress did not intend to include a State's tax lien within the grant of power to the Bankruptcy Court in Section 77 proceedings, we are in no ways concerned with those cases dealing with the exercise of power in a given situation nor are we concerned with the question of the State's consent. And so we are first concerned with the distinction between an absolute want of power and the exercise of a granted power. *In re Tyler, supra* (pg. 181); *In re Sawyer*, 124 U. S. 200, 221 (1888).

(1) *Concerning jurisdiction of subject matter.*

As we undertake consideration of the jurisdictional questions actually involved, the first important question to answer is—Did Congress intend to include a State having liens for taxes at the time of bankruptcy within the meaning of the term "creditor" as used in Section 77? There is nothing involved and intricate or new and startling in this question. Just what did Congress intend? Mr. Justice Frankfurter said for this Court in *Palmer* vs. *Massachusetts*, 308 U. S. 79, 83:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government."

Certainly no more important matter could be conceived than the necessity for a sovereign State to protect its taxes. *McCulloch* vs. *Maryland* 4 Wheat. 316. It would therefore appear that it is the duty of the petitioner to prove that Congress did intend to grant such power otherwise their case must fall at the very beginning.

We have therefore in Point III treated of the question of Congressional intent in the adoption of Section 77 of the Bankruptcy Act. We have scrupulously avoided any consideration of the question of the exercise of jurisdiction and the question of whether the State has given its consent for the reason that, if Congress did not intend to grant the power, such questions are irrelevant to the issue. In that connection we point out that, notwithstanding the tremendous volume of reorganization litigation under Section 77, not one single case has been presented where a State having liens for its taxes prior to bankruptcy has been made a party to a reorganization plan and been compelled to take either stocks or bonds in lieu of cash for its tax liens. Nor do we believe a case has been offered where a State or municipal taxing authority has been compelled to participate in a plan of reorganization without its consent.

We have therefore urged in Point III that Section 77 applies only to contract rights and is not at all concerned with rights acquired by a State prior to bankruptcy, incident to the essential governmental function of taxation.

We believe that, since Congress did not contemplate a State's participation in a plan of reorganization under the circumstances of the instant case, by the same token it could not have intended that certain other sections of the Bankruptcy Act should be applicable under such circumstances. We believe that the applicability of such other sections is limited to those persons only whose rights were intended to be affected by the said Section 77. While this Court refused to pass upon the applicability of Section 64 in *Arkansas Corporation Commission* vs. *Thompson, supra,*

and while the petitioner and bondholders seem now to be less sure of the applicability of such section under the facts of the instant case, the question of applicability must be determined in connection with the question of the intent of Congress with respect to the extent of the power granted to the Bankruptcy Court. Therefore in Point IV, we shall attempt to show that Congress did not intend that Section 64 should be applicable under the facts of our case and in Point V we shall show the lack of intent to have Sections 57 and 67 applicable.

(2) *Concerning the exercise of a granted power.*

If it is determined that Congress did intend to include a State having liens for its taxes affixed at the time of bankruptcy within the grant of power to the Bankruptcy Court in Section 77 proceedings, then we find ourselves confronted with two broad questions concerning the exercise of such power; (a) Was the grant of power without regard to consent, making it incumbent upon the State of New Jersey to participate in the reorganization proceedings in the manner prescribed by Section 77 or else be forever barred of its liens and its taxes?, or (b) Did Congress intend to grant such power subject to the rule that a State may only be a party if it shall consent? (Just as Congress specifically required consent concerning the claims of the United States for debts and taxes.) (Sect. 77(e).) (11 U.S.C.A. 205(e).)

(a) *As to the intent of Congress concerning consent.*

If it should be determined that Congress did intend to grant the power regardless of consent then we do not have to consider the question of whether the State has consented for such issue would be immaterial. The sole question then would be whether Congress could constitutionally grant such power—whether such grant of power concerning a matter of such purely local concern as property taxation would not be unconstitutional.

Again it is urged that we must carefully differentiate between the question whether Congress intended there to be consent and the question whether the State did in fact consent. In Point VI we have dealt with the question of the amount of power granted to the Bankruptcy Court in the event of the Court's holding that Section 77 proceedings contemplates a State's tax liens affixed at the time of bankruptcy. We will urge that, if Congress contemplated a grant of power in such a case, such grant must be subject to that State's consent otherwise the grant of power would be unconstitutional.

To appreciate the legal principles involved we must, at this stage of our scrutiny, again carefully avoid any consideration of acts of State officers alleged to constitute consent. We are concerned only with the question how did Congress intend that the Bankruptcy Court should exercise the power—regardless of consent or with the consent of a sovereign State? The Petitioner has failed to meet this issue and has so mingled the matter of consent and the matter of claimed grant of power that it is difficult to determine just what his real position is.

Only if it shall be determined that Congress did grant the claimed power and did grant such power subject to the State's consent, do we become concerned with the acts of the Comptroller and Attorney-General. In Point VI therefore we have sought to show that, even if Congress did intend to include a State's pre-existing tax liens in Section 77 proceedings, there could not constitutionally be the claimed grant of power except subject to the State's consent.

(b) *Concerning the facts alleged to constitute consent.*

If it is held that Congress did intend to grant power to the Bankruptcy Court to adjudicate concerning a State's liens for taxes affixed at the time of bankruptcy and if it is likewise held that such grant is subject to the State's con-

sent, then and then only need we consider the facts alleged by the petitioner to constitute consent. To maintain the distinction, we should direct all our jurisdictional study in the foregoing paragraphs to the date of the commencement of the Section 77 proceedings and before any action could possibly have been taken by the State officers. What was the situation then? We would then ask ourselves what has changed the situation?

In considering the factual matters alleged to constitute consent we thus do so under the circumstances that the Court does not have jurisdiction over the lien interest of the State prior to the doing of the acts alleged to constitute consent and under the circumstances that no step is necessary on the part of the responsible officials in order to preserve the said lien interest of the State.

We repeat that it is true that we can be prevented from enforcing the State's lien, and that in the interim values may tumble. But, we still retain our lien upon the properties. *Continental Illinois Bank* vs. *Rock Island Ry. Co., supra.* It is one thing to prove that a State's fiscal officer had consented for the State where the State is compelled to be a party regardless of consent. In that case consent is wholly illusory. It is compulsion. It is a wholly different thing to read consent into a situation by reason of conduct of State officers on the score of their alleged protection of interests requiring no protection. Concerning such interests, specific power must be found in the law before any action may be taken. *Newark* vs. *Civil Service Commission,* 115 N. J. L. 26, 29.

In this connection, both the petitioner and bondholders have failed to recognize the distinction between liens affixed at time of bankruptcy and unsecured claims. The distinction has been explained above. In the case of pre-existing liens the Court, if there is a requirement of consent and such consent is withheld, may only dispose of the security subject to the State's liens. If the State does

nothing whatever, the security will remain and the State must simply bide its time to enforce its liens.

In the case of unsecured claims, such as in *New Jersey* vs. *Anderson*, 203 U. S. 483, the State is in a different position. It cannot be made to come in and prove its claim. In a given case, the State might even prefer to avail itself of Section 17 (U. S. C. A. Sect. 35) having to do with the nondischargeability of State taxes. If, however, the State does not come in, it would lose a chance to share in those particular assets available for general creditors. If it does come in, it must submit to the jurisdiction of the Court. It cannot with one breath ask for a priority in the said general assets and with the same breath deny jurisdiction. But when it does come in, the limit of the jurisdiction of the Court is with respect to the distribution of such general assets. *In re Brannon*, 62 F. (2d) 959; *Henderson County* vs. *Wilkins*, 43 F. (2d) 670, 672 (C. C. A. 4th 1930).

If therefore a State having liens affixed at the time of bankruptcy may not be made a party without its consent and the limit of the power in the absence of consent is to maintain the status quo pending the determination of the possibility of reorganization, then specific statutory authority must be found authorizing the State's fiscal officers to submit the State's lien interest to the jurisdiction of the Bankruptcy Court. In the absence of a showing of such authority, the limit of the authority of such officers in the event Section 64 is applicable to Section 77 proceedings would be with respect to the making of a claim against unencumbered assets available for distribution to general creditors in the event that it should develop that the security together with those amounts due the State as administration expense is not adequate to discharge the tax debt. This question is covered at length in Point VII.

If the several questions posed above should be answered adversely to the State and it should be determined that Congress did lawfully grant to the Bankruptcy Court the

power summarily to adjudicate concerning a State's liens for taxes affixed at the time of bankruptcy and that the State is a party to the present reorganization proceedings, then we urge that the grant of power is limited by the rule announced in *Arkansas Corporation Commission* vs. *Thompson*, 313 U. S. 132. That Point (Point VIII) and the subsequent Points, each of which is urged in the event that such point should be reached in our stated "progression," need not be explained here. We believe that each point is sufficiently explained in its proper order. We have set forth the above explanations because of the need of an orderly development of the argument concerning jurisdiction. We respectfully urge that, if this order is followed, the several questions will become more clearly outlined and lend themselves more readily to a proper solution.

POINT II.

In answer to certain wholly unsupported arguments presented by the petitioner.

The petitioner had seen fit to make certain arguments that are so completely without merit that they require refutation at the very beginning of our argument.

A. *The petitioner's argument concerning the inchoate nature of the State's tax liens is specious.*

The petitioner states at page 53 of his brief that,

> "The alleged lien asserted by the State of New Jersey against the debtor for taxes is in the nature of an inchoate statutory lien."

Thus upon such incorrect premise he seeks to build a straw man for the purpose of knocking him down.

The taxes in question were finally fixed and determined by the State Tax Commissioner in advance of the date fixed by law for the taking effect of the State's lien. The assessing procedure for, let us say, the year 1939 started on March 1, 1938. (R. S. 54:22–1.) The Commissioner was required to complete his valuations by November 1, 1938, and on or before December 10, 1938, serve a statement of the assessed valuation. It was then provided (R. S. 54:26–2) that the State Tax Commissioner should sit on the second Monday of January, 1939, to review his assessments. R. S. 54:26–3 provided that a railroad may be heard concerning the incorrectness of any assessment. By R. S. 54:26–4 it was provided that hearings should be completed prior to April 1, 1939. By R. S. 54:26–7 provision was made for review by the State Board of Tax Appeals by filing of a complaint before the third Monday of June, 1939.

The said tax for the year 1939 became a lien upon all the lands, tangible property and franchises of the Debtor used for railroad purposes on June 1st (R. S. 54:27–4). Nothing further was required to be done to establish such lien. That such was the legislative intent is clearly borne out by R. S. 54:28–5. In that section provision is made for sale of property under execution. It provides for the sale of property "on which the tax was assessed or became a lien." (Property used for railroad purposes.) It then provides that as to "any other property" "the judgment and execution shall constitute or become liens in the same manner and to the same extent as other judgments and executions of the Supreme Court." Clearly nothing further was required to be done to make the liens fully effective upon the land, tangible personalty and franchise of the railroad company used for railroad purposes in the State. But even more significant are the provisions of N. J. R. S. 54:27–6 whereby

"a person having an interest in a mortgage or other lien" may pay the amount of the tax and interest due and whereby, thereafter, the taxes and interest thereon "shall continue a lien" for the benefit of such person. The lien of the State was not inchoate for nothing further was to be done. The State's lien had attached because it was the legislative intent. *Jersey City* vs. *Kelly*, 134 N. J. L. 239 (E. & A. 1946). The means taken to insure protection of its tax levies was proper. It was incidental to the taxing power which the State has as one of the attributes of its sovereignty. *Union Pac. R. Co.* vs. *Peniston*, 18 Wall. 29; *Nathan* vs. *Louisiana*, 8 How. 82; *Lane County* vs. *Ryan*, 7 Wall. 76; *Ward* vs. *Maryland*, 12 Wall. 428.

B. *The petitioner's argument concerning the choice of remedies provided by the State tax law is without merit.*

The Petitioner (pg. 40) argues that the New Jersey tax act authorizes several remedies for the collection of delinquent taxes. Such remedies were not mutually exclusive but were complementary one to the other. Thus by R. S. 54:28–1 it is provided that if the tax levied shall remain in default for ten days, the Attorney-General shall forthwith start enforcement proceedings. By R. S. 54:28–2 it is provided that he shall forthwith apply for an order of execution.

When this Court denied certiorari to review the Circuit Court of Appeals judgment in *Lehigh Valley R. Co.* vs. *Martin*, 100 F. (2d) 139, the Attorney-General started his enforcement proceedings but was enjoined by Order No. 3 (R. pg. 195). To assert that the State officials elected a remedy, even if the power to elect existed, seems far-fetched. We have been kept from the enjoyment of our rights by the Court. This Court met such a situation in *Michigan* vs. *Michigan Trust*, 286 U. S. 334, 346 (1931), by saying:

> "To protect through a receiver the enjoyment of corporate privileges and then to use the appointment as a barrier to the collection of the tax that should accompany the enjoyment would be an injustice to the State and a reproach to equity."

But the petitioner answers his own question. He states that by electing, the State has waived the State's lien. Where is there such a grant of power to any official? We will endeavor to answer the claim under Point VII.

Just what did our Legislature mean? It is hornbook law that there is no personal liability for taxes unless the law clearly provides for such personal liability. Thus the limit of liability for property taxes is the property itself. But with respect to railroads having special privileges and immunities in the operation of their properties, the State created personal liability. So that by N. J. R. S. 54:27–4, providing that the said taxes should be a debt, the New Jersey Legislature simply established such personal liability for such taxes and gave the State an additional fund to look to if the security afforded by its lien should be inadequate. This is in keeping with the intent as shown above in R. S. 54:28–5 providing for the taking effect of a lien upon "other property" in the event of entry of judgment.

C. *The argument of the Petitioner concerning compliance with the Settlement Acts is without merit.*

The petitioner has predicated his argument upon an alleged compliance with the Settlement Acts. By Chapter 290 of the Laws of 1941, it was provided that settlement documents must have the approval of the Attorney-General. If the said Chapter 290 did constitute an offer, nevertheless, under the rule that any acceptance of an offer must fully comply with the terms of the offer, there was no acceptance in the instant case.

It does not help the petitioner's argument to allege the ministerial nature of the Attorney-General's participation. The fact is he did not participate and therefore there could be no compliance. The railroad companies and the Legislature were well aware of the impasse which had been created for they sought to cure the situation by amending the law to eliminate the Attorney-General's participation. (Chapter 241, P. L. 1942.) But on the very day that the said Chapter 241 became law, the Chancery Court issued its injunction preventing the State Treasurer from accepting any tenders under the Settlement Acts.

The question of purported compliance should no longer be in issue here. The Circuit Court of Appeals in *In re Central Ry. Co.*, 136 F. (2d) 633, disposed of it long ago when it said: (638)

> "The final contention that the issue between the State and the trustees is moot by reason of the tender to the Treasurer of a payment pursuant to Order No. 163 must also fail. The tender though acknowledged was not accepted by the Treasurer and consequently was without legal effect. In fact the Treasurer was powerless to accept the tender by reason of the injunction issued by the Court of Chancery."

The Circuit Court in the just mentioned case permitted the trustees of the debtor to continue to make tenders pending a final determination of the constitutionality of the Settlement Acts by the New Jersey Courts but when such determination was made and the acts were declared to be unconstitutional, the matter should have ended. There was not and never could have been compliance with the said Settlement Acts. *New Jersey* vs. *Erie R. R. Co.*, 23 N. J. Misc. 203 (S. Ct. 1945).

with the many other Section 77 proceedings instituted during the recent depression period. Not one that we can find has proceeded on the assumption that a State, having a pre-existing lien for property taxes, could be made to participate in a reorganization plan and to accept some sort of evidence of debt instead of the cash required to be paid by the laws of the said State for the privilege of owning property with a fixed situs in such State.

The purpose of the said Section 77 being the rehabilitation of this debtor and there being no clear statement that Congress intended that a State could be compelled to participate in a plan of reorganization, we urge that Section 77 should be held to apply only to claims of a private nature and not to a situation where a State has liens for taxes affixed at the time of bankruptcy.

In *Grand Boulevard Inv. Co.* vs. *Strauss*, 78 F. (2d) 180, 185 (C. C. A. 8th 1935), the Court said:

> "It is needless to multiply excerpts from Section 77B showing the purpose and scope of the section. We think it clear that the scope and purpose of the section were, broadly speaking, the same as of Section 77; and that the powers conferred upon the court to carry out the purpose of the section were equally broad with those conferred in Section 77."

In *Thompson* vs. *Terminal Shares*, 104 F. (2d) 1, 7 (C. C. A. 8th 1939), the Court said:

> "The intent and purpose was to make Section 77 in that regard substantially, if not completely, identical with Section 77B so far as jurisdiction was concerned."

We believe that purpose and scope is the same in both sections with respect to the question presently before this Court. But we urge that Congress intended to concern itself only with a readjustment of private rights. It did not

contemplate a situation where a State has liens for taxes which had attached prior to the commencement of Section 77 proceedings.

By Section 77 (U. S. C. A. 205 (1) it is provided that:

> "A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise."

If Congress intended to include a State having liens for taxes within a Section 77 proceedings, then in view of the just mentioned provision we would have to ask ourselves—May the Federal Government put the State in the railroad business without its consent? And if this is answered in the affirmative, then we might very well ask—Could the Federal Government under the bankruptcy power put the State in the bakery business or the shoe business or the button business, if similar broad language were used by Congress in Section 77B?

We shall hereafter discuss the question of the State's participation in the capital set-up of any corporation, a situation proscribed by the Constitution of many of our States.

B. *Concerning status of State's liens.*

The State of New Jersey had liens for taxes for the tax years 1932 to 1939 inclusive. All of such taxes were liens upon the lands, tangible personalty and franchises of the Debtor, the latest having attached on June 1, 1939, nearly five months prior to the filing of the Section 77 petition on October 30, 1939. (N. J. R. S. 54:27-4.) As we have pointed out above, all questions as to the validity and amount of such taxes had been made res judicata by *Central Ry. Co.*

D. *The petitioner's argument regarding the existence of consideration is without merit.*

The petitioner at page 79 of his brief argues that there was consideration for the abatement of the interest payments. Of course that question is finally determined. The New Jersey Court of Errors and Appeals in *Wilentz* vs. *Hendrickson*, 135 N. J. Eq. 244 has said there was no adequate consideration. To the same effect is *New Jersey* vs. *Erie R. Co., supra.* The Court in the former case aptly characterized the alleged existence of a meritorious dispute concerning the tax assessment as follows:

> "In the light of these facts, in the light of the lack of any new issues involved, and in the light of the fact that there is no proof that the debt is not collectible, it becomes altogether clear that the asserted rights of the railroad taxpayers are 'illusory' rather than real."

See also *Murphy* vs. *West New York*, 132 N. J. L. 111.

We need not look to the New Jersey Courts alone for an expression of opinion as to the lack of any remaining real issues on July 22, 1941, the date of the passage of the first Settlement Act. In *In re New York S. & W. R. Co., supra,* the Court said concerning the same matter:

> "We insist upon a proscription of futility."

We respectfully urge that there was no consideration. But even if there were some consideration, the weight or effect to be given such consideration, is of necessity a question for the State Courts to determine. We must remember we are dealing with a State Constitution and, if that, which would otherwise be denominated a gift and violative of Article 1, paragraph 20 of our State Constitution, can be legalized by the mere "trifling inconvenience to one party or a slight advantage to the other" as urged by the peti-

tioner, then this great protection designed to prevent just such gifts to just such corporations becomes a sorry joke, a flimsy imitation for the strong bars and sturdy walls which had been intended. As shown above at page 6, there were sufficient assets to pay the amount in full. In such a situation, the Legislature was prohibited by our fundamental law from abating any part of the past due principal or interest. *Murphy* vs. *West New York, supra.* The New Jersey Supreme Court in a case involving the State Constitution said in *Gimbel* vs. *Peabody,* 114 N. J. L. 574, 577: "Time may not inure to the advantage of those who would flout the Constitution of the State."

E. *The Petitioner's statement that on October 30, 1939, the 1932 to 1939 taxes were in issue and being litigated is erroneous.*

The Petitioner states on page 7 of his brief that, when the present Section 77 petition was filed, the "1932 to 1939, inclusive" taxes were being litigated.

Just what the reasoning of the Petitioner is that leads to any such result we fail to comprehend. On such date, all litigation concerning the 1932 and 1933 taxes had ended when, this Court having refused to grant certiorari to review the Circuit Court's judgment in 100 F. (2d) 139, the Debtor filed its petition to stop the Attorney-General from proceeding with enforcement procedure. The claim, however, is indicative of the complete unwillingness of the Debtor and its Trustee to face realities.

F. *The Petitioner's statement that it was the settled law that Bankruptcy Courts had inherent power to ascertain the validity, amount and priority of all liens, including tax liens of a State, is unsupported by any authority.*

The Petitioner at page 62 of his brief states that, even before the 1938 amendment to the Bankruptcy Act, "it was the settled law that Bankruptcy Courts, as part of their

inherent power, had jurisdiction to ascertain the validity, amount and priority of all liens, including the tax liens of a State, and that if a State in a bankruptcy proceeding did not appear, it incurred the risk that its tax claim, even though secured by a lien, might be forever barred." The Petitioner cites not one single case for this so-called "well settled law" in so far as a tax lien of a State existing at the time of bankruptcy is concerned.

As pointed out above (pg. 32), the Petitioner has shown cases where claims have been made against assets available for unsecured creditors under Section 64. *New York* vs. *Irving Trust Co., supra,* and *Lyford* vs. *City of New York* are examples. Cases have been cited where the State has sought to perfect an inchoate lien. *Van Huffel* vs. *Harkelrode, supra; Lyford* vs. *State of New York, supra,* and *Straton* vs. *New, supra.* With particular reference to the *Van Huffel* vs. *Harkelrode* case, no objection was made to the Bankruptcy Court's jurisdiction generally. The sole question was whether the Court could proceed in a summary manner or whether a plenary suit was required. We repeat—the Petitioner has cited not a single case to support the rule stated by him to be the "well settled law" in so far as the pre-existing liens of a State for taxes are concerned.

G. *The Petitioner's argument concerning interest is without merit.*

We shall endeavor to show in Point V that Congress has so clearly defined the powers of Bankruptcy Courts with respect to penalties that it has become clear that no power was granted to review questions concerning the amount of interest charged for default. It was so held in *Meilink* vs. *Unemployment Compensation Commission,* 314 U. S. 564 (1942), where it was said:

> "We must give credit to the State Legislature acting within its constitutional sphere like that accorded to Congress acting in its constitutional sphere."

Our case is on all fours with the *Meilink* case. N. J. R. S. 54:27–4 clearly satisfies the test. Furthermore, another section (R. S. 54:23–4) clearly provides for a penalty. The New Jersey Court of Errors and Appeals cited the *Meilink* case in *Wilentz vs. Hendrickson, supra* (pg. 256), to support its finding that the charge is interest as distinguished from penalty. There is no doubt of the state of the law and there is therefore no authority in the Bankruptcy Court whatsoever to consider the interest question sought to be raised summarily by the Petitioner.

POINT III.

Congress did not intend to include a State with tax liens affixed at the time of bankruptcy within the meaning of "Creditor" and "Claims" as used in Section 77.

When, on April 17, 1939, this Court refused certiorari to review the judgment of the Circuit Court of Appeals with respect to the 1932 and 1933 taxes of the Debtor (*Lehigh Valley R. Co.* vs. *Martin, supra,* 306 U. S. 651), litigation concerning such taxes should have come to an end. The several moves of the Debtor in these proceedings thereafter disclose that the Debtor thinks otherwise and that he is apparently of the notion that, by the simple expedient of instituting Section 77 proceedings, a debtor may wipe all that has gone before and argue anew issues long since made res judicata. The Trustee in his petition of August 14th frankly admitted that the Section 77 petition was filed because of

> "threats by the State of New Jersey to enter judgment against the debtor upon certain claims and to sell the railroad properties of the debtor located within the State of New Jersey * * *." (R. pg. 45, par. 4.)

On page 7 of his present brief, the Petitioner claims that on October 30, 1939, the liability of the Debtor for taxes and interest for the years 1932 to 1939 were being litigated, this over six months after this Court refused certiorari in the 1932 and 1933 case as set out above (pg. 4).

We have already shown that the Court's Order No. 3 (R. pg. 195) restraining the State's collection proceedings was proper in that the said Court was authorized to maintain the status quo during the period necessary to determine whether an adequate plan of reorganization can be developed. But beyond that there is no power. As we shall endeavor to show, Congress did not intend to and could not constitutionally compel a State with tax liens to be a party to a plan of reorganization without its consent. With respect to any contention that Congress intended to empower the Bankruptcy Court to relitigate or redetermine the validity or amount of the said 1932 and 1933 taxes, such contention has been definitely and conclusively disposed of by this Court in *Arkansas Corporation Commission* vs. *Thompson*, 313 U. S. 132, *supra*.

At the time of the filing of the Section 77 petition, the Debtor's 1934, 1935 and 1936 taxes were being litigated in the Federal courts. On November 27, 1940, the Circuit Court of Appeals decided all questions concerning such taxes adversely to the Debtor in *Central Railroad Co.* vs. *Martin*, 115 F. (2d) 968, the Court saying at page 972 that the several issues had been made res judicata by *Central Railroad Co.* vs. *Martin*, 114 N. J. L. 69. It does seem therefore that any contention that Congress had empowered the Bankruptcy Court to relitigate or redetermine the amount and validity of such taxes has been definitely and conclusively disposed of adversely to the Debtor by the said *Arkansas Corporation Commission* case.

Taxes were levied for 1937 and 1938 under the same law and by the same method. The New Jersey Court of Errors and Appeals commented upon the appeals for such years as

follows in *Wilentz* vs. *Hendrickson*, 135 N. J. L. Eq. 244, 259:

> "The railroad taxpayers appeals for these years, substantially based upon the same inefficacious pattern of attack, was decided adversely to them on May 13, 1941. *State Board of Tax Appeals-Central Railroad Company of New Jersey* vs. *Martin*, 19 N. J. Misc. 427; 20 Atl. (2d) 330."

The 1939 taxes of the Debtor were before the Circuit Court of Appeals on a review of order No. 171 in these proceedings, the matter being determined adversely to the Debtor in *In re Central Railroad Co.*, 136 F. (2d) 633; Cert. den. 320 U. S. 805.

It would thus appear that the *Arkansas Corporation Commission* case is dispositive of all issues presented by the petition of August 14th concerning the amount and validity of the taxes for all the years 1932 through 1939. The Court below so held.

Good judgment might perhaps dictate that we open our argument in support of the reasoning below. But the Court below, in refusing to answer certain fundamental questions posed by the State, has left unanswered that most important question—Just how much power did Congress intend to give the Bankruptcy Court with respect to a State's liens for taxes affixed at the time of the institution of Section 77 proceedings?

Unless this vital question can be answered at this time, the State of New Jersey already considerably harrassed with seemingly endless litigation with respect to these taxes, may be compelled twice more to come before this Court—first, in opposition to a claimed power to include the New Jersey taxes in a reorganization scheme otherwise than on the basis of cash payments; and, secondly, in opposition to a claimed power in the Bankruptcy Court to compel the

State to participate in a plan providing for other than cash payment upon the State's refusing to participate voluntarily in such plan.

The State is mindful of the rule that this Court will avoid decision upon any point beyond the particular issues necessary to a determination of the cause presently before the Court. We respectfully urge that the present matter is before this Court in such fashion that the all-important question of the extent of jurisdiction may be finally determined in this present action without in any way doing violence to such rule, particularly since the interests of the people of our State are so vitally involved in this matter, affecting as it does the very backbone of the State's fiscal policy.

It is urged that Congress never intended that the rights of a State acquired as an incident of its taxing policy should be the subject of readjustment in railroad reorganization proceedings. We believe that Congress intended to deal only with rights arising ex contractu and ex delictu, except with respect to interests of the United States Government as specifically set forth, and that Section 77, properly construed, discloses nothing to support the conclusion that Congress intended to depart from its historic position of non-interference in matters of State concern. It must be admitted that nothing could be more peculiarly or particularly of State concern than the levying of property taxes and the providing for an adequate scheme for the collection thereof.

In developing this point, we shall deal with, (1) concerning the purpose of Section 77, (2) the status of the State's liens, (3) certain limitations already expressed with reference to the extent of power granted by Section 77 by Court decision, (4) what we believe Congress actually did intend by Section 77, and (5) what Congress must have intended to preserve the constitutionality of the said Section 77.

A. *Concerning the purpose of Section 77.*

Section 77 has for its main purpose the rehabilitation of a debtor Railroad Company. *Connecticut Ry. Co.* vs. *Palmer,* 305 U. S. 493, 501. (1939.) It contemplates the Debtor's continued corporate existence. *Thompson* vs. *State,* 98 F. (2d) 108 (C. C. A. 8, 1938). By such section Congress sought to avoid the delays, costs and sacrifices of liquidation.

A study of the many reorganizations proceedings conducted under the said Section 77 will disclose no instance where the Court has held that a State could be compelled to participate in a reorganization plan—to accept other than cash for its taxes when a plan has finally been evolved. There have been cases where it has been held that Section 64 is applicable in Section 77 proceedings. Those cases will be considered under Point IV hereinafter. We are presently concerned only with the intent of Congress with respect to Section 77 by and of itself.

In the very recent case of *Reconstruction Finance Corporation* vs. *Denver & R. G. R. Co.,* 66 S. Ct. 1282, this Court stated that the basic problems of railroad reorganization under Section 77 had been recently considered in *Ecker* vs. *Western Pacific R. Co.,* 318 U. S. 448 and *Group of Institutional Inventors* vs. *Chicago, Milwaukee & St. Paul R. Co.,* 318 U. S. 523. In the said *Denver & Rio Grande* case Mr. Justice Reed mentioned the "private welfare" of creditors and stockholders (pg. 1303). He spoke of the risks assumed by investors and speculators in railroad securities. Quite obviously Mr. Justice Reed was speaking throughout of private rights, those arising ex contractu and ex delictu. He was not dealing with rights acquired by public authority as an incident of a State's taxing power.

The *Western Pacific and Milwaukee* cases are not otherwise. The plan outlined in both had to do with the readjustment of obligation arising out of contract. And so

vs. *Martin*, 115 Fed. (2d) 968, citing *Tait* vs. *Western Maryland Ry. Co.*, 289 U. S. 620, and *Lehigh Valley R. Co.* vs. *Martin*, 100 F. (2d) 139.

We are not concerned in this case with a situation where a governmental body has adopted a policy of governmental investment in corporate enterprises or of investment in farm loans as in the case of certain western states. We are concerned only with the narrow question of the power of a State to levy taxes and to provide for a ready method for the collection of such taxes. As we stated above, we have no quarrel with a rule of law which puts it in the power of the Court to maintain the status quo pending a determination of the feasibility of reorganization. It is our insistence that beyond that the Court has no further power and Congress never intended to grant any such further power.

In *McCulloch* vs. *Maryland*, 4 Wheat. 316, 429, Chief Justice Marshall pointed out that the power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident." That the State in the instant case had the power to tax is no longer open to question. All Federal questions were determined adversely to the debtor with respect to the taxes involved in the present controversy in the two cases set out above. (100 F. (2d) 139 and 115 F. (2d) 968.) The power to tax set forth by the Chief Justice as "an incident of sovereignty" and "coextensive with that to which it is an incident" would be somewhat illusory if it having been determined after extensive litigation that the amounts are due, a State could be compelled to take income bonds or otherwise participate in the corporate set-up of a reorganized railroad company instead of receiving the cash for which it has waited so long.

We believe that we can demonstrate that Congress never intended that a State should participate in a reorganization plan. We believe that Congress intended to deal only with private rights and that, with respect to State matters, such matters were not intended to be handled in a Section 77 proceedings.

C. *Concerning limitations on power under Section 77.*

In *Thompson* vs. *Terminal Shares,* 104 F. (2d) 1, 5, cert. den. 308 U. S. 559, the Court said:

> "The inquiry here, however, is not as to what Congress might have done, but as to what it actually did with respect to the jurisdiction of the Bankruptcy Courts in enacting and amending Section 77."

The Court then said (p. 9) that it was not the intent of Congress that the Bankruptcy Court should take over all litigation between the debtor and third parties. The Court in that instance was dealing with a claim of the trustee against a third party. But it was a private claim and more susceptible of inclusion within the broad grant of power under Section 77 than the rights of the State in the instant case which are wholly public in nature and an incident of the retained sovereignty of the said State.

In *Palmer* vs. *Massachusetts,* 308 U. S. 79, 83, Mr. Justice Frankfurter said for this Court:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjoined bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government."

In the just mentioned case, this Court was dealing with regulations having to do with the intra-state operations of a railroad. In such operations the Federal Government may at least have an indirect adverse interest. In our case we are dealing with property taxes—the very right of a State to carry on its normal fiscal functions—one of the attributes of its retained sovereignty. In this matter so vital to the very existence of the State, it would seem that the reasoning of the learned Justice would apply with even greater force.

D. *Concerning the intent of Congress with respect to the States' tax liens in Section 77 proceedings.*

The Interim Report of the standing master, upon which the District Court relied in holding that it had the requisite jurisdiction to undertake the determinations sought by the petition of August 14, gives Section 64 of the Bankruptcy Act as the source of the authority. The necessity, in this case and in other cases, of finding some authority outside Section 77 itself to substantiate the claimed power lends weight to our contention that Section 77 of itself does not give power to the Bankruptcy Court to adjudicate concerning a State's lien for taxes affixed at the time of the filing of a Section 77 petition.

If it had been intended by Congress that a State having a paramount lien for its taxes, as in the instant case, could be brought into Section 77 proceedings by the mere serving of notice and without its consent, then two situations detrimental to the sovereignty of our State could be created: (1) Upon refusal of our State to participate in any proceedings for reorganization, the taxes would be wiped out and the company could be reorganized free and clear of the State's liens for taxes. (U. S. C. A. 205 (c) (7); and (2) A plan under authority of Section 77 (b) could provide that a State having a paramount lien carrying interest during default at 1% per month could be com-

pelled to take bonds with interest payable on a when earned basis or become a stockholder in the enterprise, notwithstanding specific constitutional prohibition against stock ownership, the only test being whether the plan in the opinion of the Court is fair and equitable.

In approaching the question of intent we must be constantly aware that "opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States" but "entirely through fear of what might result from the exercise of the powers granted to the central government" *South Carolina* vs. *United States* 199 U. S. 437, 456 (1905). This was said with respect to a conflict of governmental powers. We urge that with respect to a conflict between a State and private individuals concerning rights in property, there can be but one answer. The States never intended to grant any right of supervision.

Ours is a Union of States. *Coyle* vs. *Smith* 221 U. S. 559. Any construction that would interfere with our federal scheme must be carefully avoided. The Bankruptcy Act must be interpreted in the light of the purpose to be attained. Such a rule concerning the construction of constitutional provisions was stated for this Court in *Prigg* vs. *Pennsylvania* 16 Peters 539, 610 (1842). We must determine the mischief to be remedied. *Craig* vs. *Missouri* 4 Peters 410, 431 (1830); *Rhode Island* vs. *Massachusetts* 12 Peters 657, 723 (1838). We are primarily concerned with a reconstructed corporate set-up.

It is our purpose in this sub-point to show that Congress never intended to grant the claimed power. We believe that, before this Court will read into Section 77, a Congressional intent that a sovereign State may be compelled to become a party to Section 77 proceedings or else be deprived of its liens for taxes because of nonparticipation—a proposition so unalterably opposed to the principle of Federal noninterference in matters purely of State concern—there must be clear and unmistakable language to

such effect. We shall try to show that, not only was there no such clear language, but that the Congressional intent is quite the contrary.

The purpose behind the enactment of the reorganization legislation was to provide a scheme for the readjustment of corporate financial structures to the end that any reorganized company might meet its several obligations and continue to function as a successful operating railroad with the protection afforded to its property and operations by State laws.

(1) *Congress did not intend to include a State's liens within the scheme of Section 77 proceedings.*

What then did Congress intend? By Section 77 (b) it is provided:

> "The term 'securities' shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term 'stockholders' shall include the holders of voting-trust certificates. The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal

Court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors."

Was it intended that taxes should be included within the word "debt" or that the word "lien" included the tax liens of a State?

Taxes are the means of distributing the cost of government. *Carmichael* vs. *Southern Coal Co.* 301 U. S. 495, 509 (1937); *Welch* vs. *Henry* 305 U. S. 134, 144 (1938).

In *New Jersey* vs. *Anderson*, 203 U. S. 483, 492 (1906), this Court said:

> "'Taxes are not debts. It was so held by this Court in the case of *Oregon* vs. *Lane County*, reported in 7 Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character.'"

See also *Missouri* vs. *Ross*, 299 U. S. 72, aff. 80 F. (2d) 329 (C. C. A. 8th 1935); *In re Reimer*, 82 F. (2d) 162, 164 (C. C. A. 2nd 1936); *In re Brezin*, 297 F. 300 (D. C. N. J. 1924) 305; *In re Gould Mfg. Co.*, 11 F. Sup. 644.

The same rule has been stated by our State Courts. In *Baker* vs. *East Orange*, 95 N. J. L. 366, 367 (N. J. Sup. 1920), it was said:

> "A tax, in its essential characteristics, is not a debt nor in the nature of a debt. A tax is an impost levied

by authority of government. *City of Camden* vs. *Allen*, 26 N. J. L. 398."

In the just-mentioned case, the Court held that neither the Federal Government nor the State was a creditor within the meaning of the Act under consideration. That there was a decided distinction between debts and taxes when the bankruptcy clause was put into our Constitution is clear. Again in 1867 we find the distinction maintained. By 14 Stat. 517, ch. 176, sect. 28, a State is given priority in the distribution of a debtor's estate for "all debts due to a State" and "for all taxes and assessments made under the laws of such State." (Meaning unsecured debts and taxes.) As late as 1940, Congress in Section 67 (b) and (c) speaks of "taxes and debts" due a State.

Cursory examination of the authorities might lead to the hasty conclusion that there has been a decided change in the rule. Thus this Court in *Liberty Mutual Life Insurance Co.* vs. *Johnson Shipyards Corp.*, aff. *Stripe* vs. *United States*, 269 U. S. 503, held that the statute under review showed a clear intent that taxes should be included within the word "debt." The Circuit Court had held (6 F. (2d) 752, C. C. A. (2d) 1925) that taxes were not included. In that case the Court had before it the right of the government to receive certain moneys. And so with the many cases which seemingly have ignored the distinction. They have gone off on the question of whether the government was to receive the benefit of an Act. Any other ruling would have produced a result the law-making body would never have intended. The Court in each instance found the clear intent to have the taxes in those cases considered as debts. This has been the limit of any change.

We are not primarily concerned in a Section 77 proceedings with the collection by the Government of taxes due but with the development of a plan whereby the corporate structure of a private corporation may be revamped. It is true

that the corporation in question is carrying on a business affected with the public interest, but nevertheless it is a business conducted with private capital for private gain. And so we are confronted with the question whether Congress intended that a State having, in the words of Chief Justice Marshall, the power to tax for governmental purposes as "an incident of sovereignty" and "coextensive with that to which it is an incident" (*McCulloch* vs. *Maryland, supra*), should be a "creditor" under the meaning of Section 77 and subject to the jurisdiction of the Court in the reorganization of a private corporate structure.

Referring then to the definitions contained in Section 77 (b), set out above, we note that the Act first defines "securities." Notwithstanding the paramount nature of the State liens, there is no mention of such liens in this definition. Obviously the State would not be included within the definition "stockholder." All of the interests sought to be covered by the terms of the reorganization provisions with the exception of the claims and the interests of the United States stem out of the definition of the word "creditor."

Notwithstanding the cited cases which have distinguished the use of the word "debt" and permitted taxes to be considered as debts under specific provisions of a given statute, when to the advantage of the taxing authority, we do not find that there has been any change in the construction placed upon the term "debtor-creditor" relationship. A debtor-creditor relationship arises ex contractu. *State* vs. *Rowe* 188 N. W. 107, aff. 13 Wall. 373; *Perry* vs. *Washburn* 20 Cal. 318, 350. The emphasis placed upon the word "creditor" throughout the said Section 77 (b) must lead to the conclusion that Congress intended to include within the meaning of "securities" and "creditor" only those private relationships and undertaking involved in the corporate structure prior to bankruptcy.

The reference in the said section to the many detailed and specific types of debts, claims, liens and securities and the absence of any reference to State and municipal taxes and liens for such taxes of itself should be cogent proof that Congress never intended such public rights to be affected by any such plan of reorganization. All specific references being to liens of a private nature, the word "lien" as used in the definition of the word "claims" must be read to mean private liens of a nature similar to those specifically enumerated in the said Section 77. *Noscitur a Sociis.* This is the only reasonable construction that can be placed upon the language of the said section consistent with the constitutional limitations upon Congress and the attitude of Congress generally toward tax claims as we will hereafter develop. Any other construction must lead to the conclusion that the State could be required to participate in a plan of reorganization and unwillingly become an owner in the enterprise pursuant to Section 77 (b) which provides:

> "A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise;"

The several members of Congress must have been well acquainted with the law of the several States. It is specifically provided by Article 9, Section 6, of the Pennsylvania State Constitution that the Commonwealth shall not become a stockholder in any company, association or corporation. By Article 8, Section 4, of the Ohio State Constitution, there is provided a similar prohibition. And so in California, by Article 12, Section 13, of its Constitution. These are but a few of the several State constitutions specifically prohibiting any such ownership.

The Legislature of the State of New Jersey has already appropriated to certain municipalities a portion of the taxes and interests due in the instant case. If a State is to receive bonds and stock in lieu of cash in extinguishment of its present tax lien, a portion of such bonds and stock must be turned over to the municipalities entitled to the proceeds of the tax. By Article 1, paragraph 19, of the New Jersey State Constitution, it is provided that no municipality shall be directly or indirectly the owner of any stock or bonds of any corporation. Similar provisions are found in the constitutions of many of our States. Could Congress, in view of the historic policy of non-interference in matters confided to the several States, have intended that the several States and municipalities should violate this provision of the Constitution?

Section 77 (e) makes provision in cases where the United States of America is a creditor or stockholder. The Act clearly makes a distinction between the case where the United States Government has an interest of a proprietary or quasi-proprietary nature and one where it has a claim for taxes or customs duties. The argument was made below that the failure similarly to refer to a State's rights and claims shows an intent to permit the inclusion of such rights and claims regardless of a State's consent. We submit that the reference proves just the contrary. This section simply prescribes a method whereby duly authorized persons may, under certain circumstances, give the requisite consent of the Federal Government. It is of significance that it was found necessary to set forth such claims specifically and that the claims of the Federal Government were not considered by Congress to have been included within the broad definition of creditors and claims as set out earlier in the Act.

It seems obvious that the Bankruptcy Court would have no jurisdiction without the specific consent of Congress with respect to the claims of the United States of a

proprietary or quasi-proprietary nature. We urge that such specific consent must be found within the laws or the Constitution of the State of New Jersey before similar jurisdiction can be said to have been given to the Bankruptcy Court in the case of claims of a purely governmental nature such as the tax liens in the instant case. Congress does not possess the right to authorize any State officer to deal with or consent to the inclusion of the rights of our State in any plan of reorganization. This is a matter solely for the State Legislature, just as the inclusion of Federal claims was a matter of Federal concern. This point will be developed at length hereafter in the next sub-point.

With respect to the claims of the United States, it is significant that Congress did not include taxes and customs duties due to the United States within the provisions of the general classification of creditor, but on the contrary a specific provision is made for the payment of any adjusted amount due on taxes or customs duties in cash. Congress thereby shows a clear intent to treat taxes upon a different basis than ordinary claims arising out of contract, concerning which ordinary claims a plan of reorganization may provide for some method of payment other than by cash.

The Corporate Reorganizations Provisions of the Bankruptcy Act clearly reveal the Congression intent concerning the use of the word "creditor." In 11 U. S. C. A. Section 506, it is provided in part that "claims shall include all claims of whatever character against a debtor or his property;" a creditor shall mean "the holder of any claim;" and that debts "shall include all claims." By Section 599 it is provided that "if the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter" and the Secretary of the Treasury is given authority concerning the acceptance or rejection of a plan. Notwithstanding the broad language just used, the said Section 599 then goes on to provide for a case in which

"the United States is a secured or unsecured creditor on claims for taxes or customs duties." This proves two things (1) that taxes never were intended to be included within the broad definition of claims, nor the taxing authority within the broad definition of creditor. (2) It shows furthermore than Congress had no particular motive arising out of the public nature of a railroad enterprise when it made the provisions in Section 77 concerning the participation of the United States in the reorganization scheme.

It is the logic of the *Palmer* case, *supra*, that, unless there is a clear and unmistakable grant of power to the Bankruptcy Court to make adjudications and determinations concerning a State's tax liens in Section 77 proceedings, this Court in support of the ancient doctrine of non-interference in matters of strictly State concern must find no grant of power in the Bankruptcy Court to consider other than private interests in a railroad reorganization proceedings. While we believe that the language used by Congress in the said Section 77 shows a definite intent to use the word "creditor" in the manner in which it has generally been used—in connection with arrangements arising out of contract—we need not rely alone upon this as proof of the Congressional purpose. Of even greater force is the attitude of Congress throughout the Bankruptcy Act wherein there has been demonstrated a fixed and definite policy and purpose to preserve the rights of State taxing authorities.

By Section 17 (11 U. S. C. A. Section 35), it is provided that discharge in bankruptcy shall not discharge a bankrupt from any amount "due as a tax levied by * * * the State." Is there any reason why Congress could have intended that the ordinary private individual who had gone into bankruptcy should not be discharged of taxes due to a State while a private corporation engaged in the railroad business should be given different treatment? By Section 64 (a) (11 U. S. C. A. 104 (a)) unsecured taxes are given a position of priority in the distribution of the estate of a

bankrupt before dividends to general creditors. By Section 67 (b) (11 U. S. C. A. Section 107 (b)), it is provided that statutory liens will be valid even though arising or perfected within the four-month period. By act of January 8, 1934 (28 U. S. C. A. Section 124 (a)), it is provided that a trustee in bankruptcy conducting a business

> "shall be subject to all state and local taxes applicable to such business, the same as if such business were conducted by an individual or corporation."

With particular reference to the non-dischargeability of State taxes under Section 17, we wish to point out the inconsistency that results from a necessary construction of Section 77 (l) and Section 77 (f) if our tax liens are held to be claims, and the State a creditor under the said Section 77. As shown on page 63 of Petitioner's brief, Section 77 (l) provides that the rights and liabilities of creditors and the duties of a debtor shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication entered on the day when the debtor's petition was filed. Thus on that day a private debtor would have owed taxes to the State which, under the said Section 17, were nondischargeable. But by Section 77 (f) it is provided that a plan shall be binding upon a creditor regardless of his participation and the property dealt with shall be free and clear of all claims against the debtor. Clearly these two provisions can only be reconciled if "claims" mean only private claims and "creditor" means only those having claims arising ex contractu or ex delictu.

Congress quite obviously has sought carefully to preserve the rights of taxing authorities generally. In view of this clear purpose, it may not be said that Congress was so unmindful of the rights of a sovereign State to be paid its taxes as to put it within the power of the Bankruptcy Court in a railroad reorganization proceedings under Sec-

tion 77 to compel a State to surrender its sovereign immunity—its right to have the power to tax treated as "an incident of sovereignty" and "co-extensive with that to which it is an incident"—and submit to participation in Section 77 proceedings or in the alternative to have its tax liens completely wiped out as provided in Section 205 (c) (7). The Court in *In re Gustave Schaefer* 103 F (2d) 237, 241 (C. C. A. 6th 1939) said that it was unnecessary to decide whether Congress could deprive a State of its common law or statutory lien for taxes. We respectfully urge that the question should be answered. We shall point out hereafter that any such grant of power would be unconstitutional. We have tried to confine our discussion under the present sub-point to argument showing the lack of a clear intent on the part of Congress to grant any such power.

2. Congress could not constitutionally grant the claimed power without a State's consent and so in the absence of a positive provision for consent, it must be construed that Congress did not intend to grant such power.

We shall hereafter in Point VI present the argument that, if Congress did intend to grant the power to include a State having pre-existing tax liens in section 77 proceedings, then such grant of power must be subject to the consent of the State (1) because it would otherwise be an unwarranted and unnecessary interference in a matter of strictly State concern and (2) because, with particular reference to determinations sought by the petition of August 14, the making of such determinations would constitute a suit or suits against the State. We are concerned here with the lack of intent.

The language of Section 77 appears to be broad and definite. If the State under the circumstances of our case is a creditor, then the State must file its claims or be barred

notwithstanding the nature of its liens or the time of their taking effect. There is no mention of consent of the State. In this sub-point we shall therefore argue that, if Congress intended the Act to be operative in our case, consent is requisite and that in the absence of a provision for such consent the said Section 77 would be unconstitutional. However, the said Section, in the light of what has been said in sub-point D (1) above, can be reasonably construed as not to include a State's tax liens within its meaning. In keeping with the long established rule that, where there are two constructions one of which would result in a finding of unconstitutionality and the other in a finding of constitutionality, the Court will arrive at that construction which will render the Act constitutional, we will urge that this Court should find that Congress did not intend to grant the claimed power to the Bankruptcy Court. *Plymouth Coal Co.* vs. *Pennsylvania* 232, U. S. 531 (1914); *United States* vs. *Jim Fuey Moy* 241 U. S. 394 (1916); *The Abby Dodge* 223 U. S. 166 (1912).

In *Ashton* vs. *Cameron County*, 298 U. S. 513, 531 (1936), this Court said:

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. *United States* vs. *Butler*, decided January 6, 1936, 297 U. S. 1. The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See *United States* vs. *Constantine* 296 U. S. 287.
>
> Like any sovereignty, a State may voluntarily consent to be sued; may permit actions against her political divisions to enforce their obligations. Such proceedings against these subdivisions have often been entertained in Federal Courts. But nothing in this tends to support the view that the Federal Government,

acting under the bankruptcy clause, may impose its will and impair state powers—pass laws inconsistent with the idea of sovereignty."

The power of the State to tax the property in question having a situs within our State cannot be questioned. Such power is one of the State's attributes of sovereignty. *Union Pac. Ry. Co.* vs. *Peniston* 18 Wall, 5, 29, 21 L. Ed. 787 (1873); *Ohio Life Insurance Co.* vs. *Debolt,* 16 How. 416, 428, 14 L. Ed. 997 (1853); *Lane County* vs. *Oregon* 7 Wall, 71, 76, 19 L. Ed. 101 (1868). A state has plenary power to tax all property within its limits unless specifically restrained by force of federal law and as a necessary incident of such power to provide appropriate means for the enforcement of collection of such taxes. *U. S.* vs. *Hester* 137 F. (2d) 145 (C. C. A. 10th 1943). The State has general power to create a lien for its debt. *Lyford* vs. *State of New York* 140, F. (2d) 840, cert. den. 323 U. S. 714.

On the other hand, Congress has the power to establish uniform laws on the subject of bankruptcy. Is there any conflict here? We believe not except with respect to the aforementioned requirement that a State must forego enforcement of its liens pending the determination by the Court of the feasibility of a plan of reorganization.

To understand our present problem we must consider the historical development of the subject. In Blackstone's Commentaries Book II, page 487 et seq., the subject is discussed at length. We see there the limitation both upon the persons who may avail themselves of the benefits of the Act and upon the property available for distribution to creditors.

The history of bankruptcy legislation in the United States is set forth at length in *Hanover National Bank* vs. *Moyses,* 186 U. S. 181, 184, 186 (1902). In that case at page 189, the distinction between debts and taxes is maintained. We have pointed out above the legislative policy of clearly

differentiating between debts and taxes in the 1867 Bankruptcy Act. (14 Stat. 517, Sect. 28), and again in Section 67 (b) and (c) of the present Act. We learn that, while the persons who may resort to bankruptcy voluntarily or be forced into involuntary bankruptcy has been from time to time enlarged, generally changes in the Act have been with respect to the contractual relations of parties unable to meet their debts.

Mr. Justice Cardozo in his dissenting opinion in *Ashton* vs. *Cameron County*, 298 U. S. 513, 535 (1936), stated concerning the origin and growth of the bankruptcy power that:

"The history is one of an expanding concept."

He then lists (pg. 535) the changes that have taken place in such expanding concept. In every instance such changes had to do with the question of who could avail himself of the bankruptcy privilege or the question of the voluntary or involuntary nature of the proceedings. The two opinions in the *Cameron County* case and the opinion in the later case of *United States* vs. *Bekins*, 304 U. S. 27 (1938), adopting the dissenting opinion, should be dispositive of the question of whether or not Congress may without a State's consent compel it to submit to reorganization proceedings under Section 77 or lose its tax liens affixed at the time of bankruptcy. The answer is unquestionably—No!

In the *Cameron County* case, there was presented a situation where a political subdivision of a State sought to avail itself of an amendment to the Bankruptcy Act devised for the relief of local governments. There is no doubt that the municipalities for whose benefit the amendment was passed were in sore need of assistance. The complaining parties were private individuals whose rights arose out of the contract obligations of such municipalities. Because of the contract clause of the Constitution, the majority held the

Act to be unconstitutional. The reasoning of the majority was characterized as follows by Mr. Justice Cardozo in his dissent (pg. 541):

> "To hold that this purpose must be thwarted by the Courts because of a supposed affront to the dignity of a State, though the State disclaims the affront and is doing all it can to keep the law alive, is to make dignity a doubtful blessing."

There we were dealing with the contract obligations of a hard-pressed municipality—a proper subject of bankruptcy. Here we are dealing with the sovereign's right to be free from interference in matters of its fiscal policy.

If we examine the two opinions in the *Cameron County* case and the opinion in *United States* vs. *Bekins, supra,* we must come to the conclusion that, on the basis of all of the opinions, Congress would not have the power to authorize the Bankruptcy Court to include the tax liens of a State affixed at the time of bankruptcy in a Section 77 proceedings without the State's consent. In fact from the majority opinion in the earlier case a very creditable argument could be made that there is no power at all to include such liens because of the provisions of many State Constitutions concerning the making of gifts (*Wilentz* vs. *Hendrickson* (135 N. J. L. Eq. 244)), and the provisions already mentioned concerning the owning of stocks and bonds of private corporations. The said majority opinion states (pg. 530):

> "Neither consent nor submission by States can enlarge the powers of Congress: none can exist except those which are granted."

We will not press this last-mentioned point at this time because our purposes are fully served if this Court finds the requirement of consent.

In the dissenting opinion, page 543, Mr. Justice Cardozo points out the "care with which the governmental powers of the State and its subdivisions are maintained inviolate." Chief Justice Hughes carries on from there in *United States vs. Bekins, supra.* At page 53, we find

> "As the States were at liberty upon obtaining the consent of Congress to make agreements with one another, we saw no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. And we added that 'Nowhere in our scheme of government—in the limitations express or implies of our federal constitution—do we find that she (the State) is prohibited from assenting to conditions that will assure a fair and just requital for benefits received.'"

and again at page 54,

> "The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under State law it lies in the right of the State to oppose federal interference. The State steps in to remove the obstacle. The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case."

So much with reference to a political subdivision of a State unable to meet its contract obligations. Considering the above and considering the comment of Mr. Justice Car-

dozo concerning the distinction between a State, which is "a sovereign or at least a quasi-sovereign," and its local governmental units, we must be impressed that, under the rule of law as expressed in those cases, the State may not be made a party to a Section 77 proceedings, without its consent, and any attempt by Congress to compel participation without such consent would be unconstitutional.

Is there any clear requirement for consent set forth in such section? The answer is in the negative. Therefore it would seem that if Congress did intend to include the State within the terms of Section 77 the Act would be unconstitutional to that extent. But did Congress so intend? A very reasonable construction of the said Section 77 leads to the conclusion that Congress intended only private contract relationships to be considered in the reorganization plan. As pointed out above a Court will not arrive at a construction of an act which renders it unconstitutional unless clearly compelled to do so by the express language of the statute. *Plymouth Coal Co.* vs. *Pennsylvania, supra; United States* vs. *Jim Fuey Moy, supra;* the *Abby Dodge* vs. *United States, supra.* We feel that this Court should find that there was no such intent and that Section 77 does not apply to pre-existing tax liens.

In conclusion of this point, we respectfully urge that Congress did not intend to grant to the Bankruptcy Court the claimed power. This does not mean as suggested by the petitioner that a debtor or its trustee must accept as final any amount stated by a State's fiscal officer to be due. Every remedy that was open to the Debtor before bankruptcy is still available to the Trustee. Every remedy that any other railroad company may have is presently available. The Trustee simply does not have an additional remedy by reason of the institution of Section 77 proceedings. This is quite in harmony with Mr. Justice Frankfurter's view as expressed in *Palmer* vs. *Massachusetts, supra,* as follows:

> "But the whole scheme of Section 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estate."

It may be said that delay may be caused by any requirement for going to other courts. That argument is without merit because of the known lengthy procedure involved in all such reorganizations. But even were there a probability of some delay, that could not change the law for as said in *Chicago* vs. *Fieldcrest Dairies,* 316 U. S. 168, 171 (1942):

> "Consideration of delay, inconvenience, and cost to the parties which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole."

This is wholly in keeping with the view expressed in *Arkansas Corporation Commission* vs. *Thompson, supra,* wherein we find:

> "But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as super assessment tribunals over state taxing agencies."

POINT IV.

Congress did not intend that Section 64 should be applicable in Section 77 proceedings.

Jurisdiction was assumed by the District Court under Section 64 (a) (U. S. C. A. Sect. 104 (a)) of the Bankruptcy Act which provides in part:

> "That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

In *Arkansas Corporation Commission* vs. *Thompson, supra,* this Court held that it was unnecessary to determine whether Section 64 (a.) is applicable in Section 77 proceedings because, on the facts of that case, no authority existed to make the determinations sought even if the said Section 64 were generally applicable. As we shall point out in greater detail in Point VIII, the facts in the instant case are even more favorable to the State of New Jersey than the facts presented by the Arkansas case. In our case the Courts had already adjudicated concerning the taxing method employed by this State in reviews of the very taxes involved in the present cause.

But regardless of the amount of prior litigation and regardless of the remedies afforded in the State tribunals, we believe it was not the intent of Congress to have Section 64 (a) applicable in Section 77 proceedings with respect to pre-existing liens for the reason that (1) Section 64 is applicable only where liquidation is required and (2) in no event could 64 apply in the instant case because Section 64 has no application where valid liens exist.

A. *Section 64 applies only in case of liquidation.*

Congress could not have intended that Section 64 should be applicable in Section 77 proceedings for the reason that such Section 64 contemplates situations arising in liquidation and the philosophy of liquidation is directly opposite to that of reorganization. Section 77 on its part was designed for the purpose of readjusting private rights and not to review state taxing methods.

The Courts in construing Section 64 prior to the passage of the said Section 77 have stated that the purpose of Section 64 was to have tax claims ascertained and determined before the first dividends were declared. *In re Starin,* 12 F. (2d) 471; *Cohen* vs. *United States,* 115 F. (2d) 505. It was designed to assist the Court in winding up the affairs of the bankrupt and distributing his estate as promptly and inexpensively as possible. Apparently only unadjudicated tax claims were in contemplation.

It takes but a casual reading of Section 77 to demonstrate that, in a Section 77 proceeding, which contemplates only the preservation of the status quo of an operating railroad company during the time necessary to determine the feasibility of reorganizing the financial structure of such railroad company, there is no such urgency. Assume the maximum of effort, yet the time necessarily involved in developing a plan, having it passed upon by the Interstate Commerce Commission, sent to the District Court for approval, returned to the said Commission for a vote, and again returned to the District Court in the event of the necessity of applying the "jam-down" provisions of the said section, must be considerable. There is a sufficient time to secure any needed determination concerning tax liability in a plenary suit. There is not the urgent need of using the summary procedure of bankruptcy as there is in the case of liquidation.

We respectfully urge that Congress never intended to supplant the State Courts in matters affecting a State's tax lien interests. *Palmer* vs. *Massachusetts, supra.* It sought in certain limited cases to have the Federal Court make certain determinations under Section 64, the balance of convenience in those cases being sufficient to take the matter away from the State Courts. But even in such cases, there was established a very definite limitation—the section was made applicable only in a case where a taxing authority, otherwise having no security for its taxes, seeks a priority under the said Section 64. Even in such a case a State does not have to make a claim. *New York* vs. *Irving Trust Co., supra.* Also any review is limited to the question of the State's right to share in free assets. *Henderson County* vs. *Wilkins, supra.*

The provision concerning the review of taxes contained in the proviso is of necessity limited in its application by the general purpose of the said Section 64. That purpose is the distribution of the bankrupt's assets to general creditors. This section was first enacted in 1892 as part of the bankruptcy law and was amended at various times until its enactment in its present form in 1938 (52 Stat. 874, C. 575). Prior to March 3, 1933 (11 U. S. C. A. Sect. 205), there was no provision in the bankruptcy law relating to railroads or to their reorganization in the Bankruptcy Court. It follows therefore that Section 77 proceedings were not in contemplation of Congress when it enacted Section 64. Nothing in the 1938 amendment or elsewhere indicates that Congress intended that Section 64 should apply in Section 77 proceedings. On the contrary in 1940, we still see Congress differentiating between taxes and debts. (Sections 67 (b) and (c).) In a matter so vital to local sovereignties, it is inconceivable that Congress would have remained silent if it had intended that such section should be applicable to the tax liens of a State existing at the time of the institution of Section 77 proceedings.

The taxes in question were levied as an incident of sovereignty. The Federal Courts have already held these very taxes to be free of constitutional objection. 100 F. (2d) 139; 115 F. (2d) 968. Certainly it may not be said that there could have been an intent to oust our State Courts of jurisdiction in the circumstances of this case for, as stated by this Court in *Boteller* vs. *Ingels*, 308 U. S. 57, 61 (1939), an

> "Immunity from local laws will not be read into the bankruptcy act."

It does seem that certain provisions of Section 64 are wholly inapplicable to and inconsistent with Section 77 proceedings. The section speaks of payment of dividends to creditors and repeatedly of the "bankrupt." In Section 77 proceedings a railroad in reorganization is referred to as the "debtor" and not as a "bankrupt." This Court, in *Lowden* vs. *Northwestern National Bank & Trust Co.*, 298 U. S. 160, 164, wherein the Court refused to apply Section 57 to Section 77B proceedings, said:

> "A proceeding to reorganize is not a bankruptcy, although an amendment to the bankruptcy act creates and regulates the remedy."

In view of what was said by this Court in *Boteller* vs. *Ingels, supra,* to the effect that:

> "The Act of 1934 indicates a congressional purpose to facilitate—not to obstruct—enforcement of State laws: the court below correctly recognized and applied this congressional purpose * * *,"

we urge that this Court should determine that Section 64 was not intended to apply in Section 77 proceedings.

Comparison with the former Section 77B is revealing. A decree adjudicating a petitioner a bankrupt and directing a liquidation of the company is impossible under Section 77, although it was expressly provided in Section 77B. With respect to Section 77B proceedings, Section 64 was made applicable by express provision of the law. It was applicable, however, only where reorganization had been found impossible and it became necessary to resort to liquidation. In *City of Springfield* vs. *Hotel Charles Co.*, 84 F. (2d) 589 (1936), and again in *Eldredge Brewing Co.* vs. *City of Portsmouth* 118 F. (2d) 410, 413 (1941), the First Circuit in a Section 77B proceedings held that Section 64 had no application to tax claims unless and until an order of liquidation. To the same effect are *In re A. V. Manning's Sons*, 16 Fed. Supp. 932; *In re New York O. & W. Railroad Co.*, 25 Fed. Supp. 709, and *Texas Co.* vs. *Blue Way Lines, Inc.*, 93 Fed. (2d) 593.

There was a similarity of purpose in Section 77 and Section 77B of the Bankruptcy Act. One extended relief and the remedy of reorganization to railroad corporations (Section 77) and the other to non-railroad corporations. So long, therefore, as reorganization is the objective of the proceeding, like rules of applicable law and procedure should prevail. The cases cited above show that so long as Section 77B proceedings remained a reorganization proceeding, Section 64 did not apply. Since Section 77 proceedings are never anything else but reorganization proceedings, in logic Section 64 should never apply in said Section 77 proceedings. As pointed out above, the time element is not of such importance in reorganization as it is when the proceedings become liquidation proceedings. In fact, there is no such time element and no reason why Congress should have departed from its time-honored policy of non-interference in matters strictly of State concern such as the matters which are presented in the instant case concerning the rights of a sovereign State to have

questions concerning the levy and assessment of State taxes determined in the manner provided by State laws.

B. *Section 64 has no application where liens exist.*

That the Master has misunderstood the problem with which we are confronted is clear from his treatment of Section 64 (a) of the Bankruptcy Act on pages 15 and 16 of his interim report. He states that the said Section 64 (11 U. S. C. A. Section 104) gives the Court jurisdiction to adjudicate the amount and validity of the tax liens of the State.

As we shall later point out, any construction of Section 64 that would permit an adjudication concerning the rights of a State without its consent would be unconstitutional. We urge here, however, that Section 64 can have no applicability to the pre-existing tax liens of the State since the said section deals only with the question of the priority of unsecured claims against the general assets of the debtor's estate after all liens and encumbrances have been provided for. It applies only to those who have no lien upon such assets, and who, but for the said Section 64 (a), would have no priority in such assets. The said section does not affect valid liens. *Miners' Savings Bank of Pittston* vs. *Joyce*, 97 F. (2d) 973 (C. C. A. 3rd, 1938); *Ingram* vs. *Coos County*, 71 Fed. (2d) 889 (C. C. A. 9th, 1934); *In re Brannon*, 62 F. (2) 959 (C. C. A. 5th, 1933), cert. den., 289 U. S. 742, sub. nom. *Ryan* vs. *City of Dallas; In re Know-Powell-Stockton Co.*, 100 F. (2d) 979 (C. C. A. 9th, 1939); *Strom* vs. *Peikes*, 123 F. (2d) 1003 (C. C. A. 2nd, 1941); *In re Weil*, 46 F. Supp. 14 (D. C. Pa. 1942); *In re Wilkes-Barre & E. R. Co.*, 46 F. Supp. 12 (D. C. Pa. 1942); *Hidalgo and Cameron Counties* vs. *American R. S. L. & I. Co.* 103 F. (2d) 509, 513 (C. C. A. 5th 1939); *In re Martin* 75 F. (2d) 618, 621 (C. C. A. 7th 1935).

In *In re Brannon, supra,* 62 F. (2d) 959 (C. C. A. 5th 1933), cert. den., 289 U. S. 742, sub. nom. *Ryan* vs. *Dallas,* the Court stated the rule at page 960:

> "Section 64 gives the rule for paying out the money arising from the bankrupt's property which remains for general distribution after all special liens and encumbrances have been dealt with. * * * On the other hand, where the creditor before the bankruptcy has an established lien on the bankrupt's property which binds it as to third persons and which is not invalidated by the bankruptcy, he does not come under the operation of section 64."

In the present case, of course, the tax debt to the State of New Jersey, both for principal and interest, is secured by a statutory lien on all of the lands, tangible property and franchises of the Debtor situated in this State. R. S. 54:27–4; R. S. 54:27–6; *Wilentz* vs. *Hendrickson, supra,* where it was stated (133 N. J. Eq., at p. 466):

> "The reference to the obligation for which a lien is given embraces the accrued interest."

This construction was approved by the Court of Errors and Appeals (135 N. J. Eq. 244, at pp. 253-4).

Any power in the Court to review taxes under Section 64 must thus be with reference only to the State's right, if claimed, to share in the assets of the Debtor upon which the State has no lien. This could only happen if the State has exhausted the security covered by its lien upon the said lands, tangible property and franchises and there should remain a deficit.

The case of *New Jersey* vs. *Anderson,* 203 U. S. 483, cited by the intervenors heretofore, is inapplicable as dealing only with taxes not secured by a lien. This was specifically

pointed out in *In re Brannon, supra* (62 F. (2d), at p. 960). The *New Jersey* vs. *Anderson* case was also distinguished in the *Arkansas Corporation Commission* case.

The cases cited by the petitioner do not dispute this rule. In *New York* vs. *Irving Trust Co., supra*, the Court was dealing with unsecured claims just as in the *New Jersey* vs. *Anderson* case. Again in *Lyford* vs. *City of New York, supra*, application for distribution had been made against general assets. In *Lyford* vs. *State of New York, supra*, the State was seeking to establish a lien. It had no pre-existing lien and so was the moving party.

The distinction is perhaps most clearly brought out by *In re Thornycroft*, 120 F. (2d) 469 (C. C. A. 2nd 1941). In that case the taxing authority had a lien subordinate to certain mortgages. The property was not sufficient to pay the mortgages. The said authority sought to gain an advantage under Section 64, but it was held that Section 64 applied only after all liens were discharged.

We, therefore, submit that the Bankruptcy Court received no power to make adjudications concerning the pre-existing tax liens of the State by reason of Section 64. The fact that the Trustees and Master were forced to rely solely upon Section 64, which has nothing to do with pre-existing liens, for authority to undertake the determinations sought by the petition of August 14, is compelling proof that Congress never intended to give the Bankruptcy Court any power to adjudicate summarily concerning such liens under any circumstances whatsoever.

POINT V.

Neither Sections 57 or 67 of the Bankruptcy Act give jurisdiction to the Bankruptcy Court to adjudicate in a summary manner concerning the pre-existing tax liens of the State.

In their argument below the petitioner and the bondholder relied upon Section 64 (a) as the source of authority to review the taxes in question. The Master in his Interim Report (R. pg. 38) placed reliance upon such section. It appears that the bondholders now rely upon the broad powers contained in the Act and that the petitioner for the first time places great reliance upon Sections 57 (11 U. S. C. A. 93) and 67 (U. S. C. A. 107) to sustain their contention that the Bankruptcy Court is empowered to undertake the review sought by the petition of August 14th. We respectfully urge that neither section grants the claimed power.

A. *Section* 57 (11 *U. S. C. A.* 93) *does not grant the power to make the said adjudications.*

That Section 57 deals only with the estate of the bankrupt, as we understand such estate, is shown clearly by subsection (e) which provides for the temporary participation in creditor's meeting of secured creditors to the extent only that their claims exceed the value of their security. Further by subsection (n) it is provided that only the claims provable under the bankruptcy act shall be proved and filed in the manner provided in the said Section 57. In other words some authority must be found outside the said Section 57 before it may be held that there has been a grant of power. As we have pointed out, the provision of the Bankruptcy Act are applicable to the estate of the bankrupt only and are not at all concerned with distributing other than that actually owned by the said bankrupt, what is left after all valid liens have been taken care of.

We also respectfully submit that it is apparent that Section 57 is concerned primarily with liquidation. It is concerned with dividends—the parcelling out to the several creditors of that which is available for payment of those whose claims are against the general assets of a bankrupt. The argument submitted above in Point IV-A concerning Section 64 is likewise applicable with respect to the said Section 57. A railroad reorganization is not concerned with liquidation. Its purpose is to keep a railroad together as a unit, as a going concern. *Continental Bank* vs. *Rock Island, supra.*

Rather than destroying the State's argument that Congress never intended that a State's liens for taxes and the interest due thereon should be the subject of summary adjudication in a Section 77 proceedings, the said section 57 strengthens that argument. By subsection (j) it is provided that debts due to a State as a penalty or forfeiture shall be allowed for a lessened amount. The specific mention of such penalties or forfeitures shows clearly that Congress never intended to give the Bankruptcy Court power to adjudicate concerning interest. It has so been held in *Meilink* vs. *Unemployment Compensation Commission*, 314 U. S. 564 (1942), where at page 569 we find:

> "We must give credit to a state legislature acting within its constitutional sphere like that accorded to Congress acting in its constitutional sphere."

Our case is on all fours with the *Meilink* case. The New Jersey Statutes provided in R. S. 54:27–4.

> "If the taxes of the company or any portion thereof, remain unpaid on December first following the levying thereof, the company shall be considered in default and such taxes, or the unpaid portion thereof shall thenceforth bear interest at the rate of one per cent for each month until paid, notwithstanding the prosecution of a writ of certiorari or other remedy."

Reference to the statute shows that uniformly the charge for interest on account of default in payment was designated as interest and not as penalty. Furthermore there is a provision for penalty in the Act and it is specifically called a penalty. Section 54:23-4 provided for a fixed penalty, regardless of the element of time, in the event of the making of a willful return. (There is no question of any such penalty in this case.) The New Jersey Legislature has strictly maintained the distinction between interest and penalty required by the rule of the said *Meilink* case.

But in addition, the New Jersey Court of Errors and Appeals in *Wilentz* vs. *Hendrickson, supra,* has already determined that the statutory charge for default is interest as distinguished from penalty, and in arriving at that conclusion cited the just mentioned *Meilink* case. (pg. 256.)

We respectfully submit that Section 57 does not authorize the Bankruptcy Court to make the adjudication sought by the petition of August 14th.

B. *Section 67 (11 U.S.C.A. 107) does not confer the power to make the requested determinations.*

Section 67 (U. S. C. A. 107) does not grant the claimed power. On the contrary the said section shows conclusively that Congress did not intend to grant the Bankruptcy Court the power to make the determinations sought by the petition of August 14th.

We first direct attention to subsection (b) where it is provided that "statutory liens for *taxes and debts* owing to the United States or any State" may be valid even though arising within the four-month period. (Italics ours.) So that as late as August 22, 1940, Congress still continued to draw a distinction between taxes and ordinary debts. We have already stated above that the attitude of Congress as expressed in the said subsection (b) is one of careful consideration of the rights and interests of a sov-

ereign State and is wholly in keeping with the spirit which should exist if we are to strike that nice balance between national and State authority in this most sensitive area of government as suggested in *Palmer* vs. *Massachusetts*, *supra*.

But the said section proves more. The New Jersey Statute required nothing further to be done to perfect its liens. The said liens attached on June 1st of each succeeding year. The section would only have been applicable if we had found it necessary to assert a lien upon property other than that used for railroad purposes under N. J. R. S. 54:28-5.

Again in subsection 67 (c) we see the clear intent of Congress not to disturb the interest of the State to the advantage of other private lienors. Again the Act provides for "liens for taxes and debts" and then goes on to subordinate a State's liens for taxes upon personal property only, of which a State has not taken possession, to certain specific administration charges and to certain wages which became due within three months before the institution of bankruptcy proceedings. Of course in view of the specific limitation, it is clear Congress intended to have the State's liens upon personalty otherwise intact. With respect to the State's liens upon realty, they are not affected at all. They remain intact.

The most amazing thing about this whole case is that Petitioner has created the issue of the inchoate nature of lien in order to apply the provisions of the said Section 67, with respect to personalty, which is only a comparatively small portion of the property involved and of importance only in case of liquidation. Of course, in the instant case, we are concerned with reorganization and with paramount tax liens upon realty having a value far in excess of such liens. And such must be the case, otherwise there could be no reorganization. Certainly Congress could never have intended a reorganization of a company whose main stem and terminals are of a value less than the said tax liens.

The provision of the said section are clearly applicable to liquidation with respect to which we are not now concerned. We do not believe that there will be any difficulty with payment of any of the charges set forth in paragraphs 1 and 2 of Section 64. There has been no claim that the value of the liened railroad property is less than the amount of the State's liens for taxes and interest. On the contrary the only proof shows that value to be far in excess of such taxes. This Debtor will be reorganized.

We submit therefore that Congress did not grant power to the Bankruptcy Court to make the requested adjudications by anything contained in the said Section 67. On the contrary the clear intent is to leave untouched such lien interests even in a liquidation proceeding. A fortiori it may not be said that the Bankruptcy Court received the authority to undertake the determinations sought by the petition of August 14th by anything contained in the said Section 67.

The rule of *Lowden* vs. *Bank, supra,* concerning Section 77B proceedings, should be broadened to include reorganizations arising under Section 77, and it should be held that neither Sections 57 or 67 are applicable to Section 77 proceedings in so far as the pre-existing tax liens of the State are concerned.

POINT VI.

If Congress did intend to include a State's pre-existing tax liens within the plan of a Section 77 reorganization or if Congress intended to grant power to the Bankruptcy Court in any other manner to adjudicate concerning such tax liens, then any such grant of power must be subject to the State's consent, otherwise such inclusion or grant of power would be unconstitutional.

The State argued above under Point III, D(2) (pg. 70), that the State could not be made to participate in a Section 77 reorganization proceedings under the facts of the instant

case without its consent and that, since no such consent is expressly required, Congress could not have intended to include the State within the scheme of reorganization. We will urge in this point (A) that if Congress did intend to include a State with such tax liens as a creditor, then the Court must somehow read into the said section the requirement of consent, (B) that if Congress intended to give power to the Bankruptcy Court summarily to adjudicate concerning such tax liens, such grant of power is likewise subject to the State's consent for otherwise such grant of power would violate the right of a State to be immune from suit without its consent, and (C) if Congress did intend to grant the power to make such adjudications regardless of consent, then Section 77 is unconstitutional.

As we have pointed out, the Trustees have consistently refused to recognize the distinction between liens affixed at the time of bankruptcy and those that accrue subsequent to bankruptcy with respect to prior taxes. We are not concerned with those taxes that have become due subsequent to bankruptcy because, as pointed out above, they are clearly the obligation of the Trustee.

We have discussed above the changing concept concerning the persons who may be the subject of bankruptcy legislation and the broad powers that may be conferred by Congress on the Bankruptcy Courts with respect to the "estates" of such persons. There has also been a decided change in policy concerning the extent of jurisdiction given to Bankruptcy Courts with respect to interests outside the jurisdiction of the said courts at the time of bankruptcy but which affect the quantum of the estate of a bankrupt. Thus in early years the interests of mortgagees were not the subject of adjudication in a summary bankruptcy proceedings. Latterly such interests may be reviewed in such proceedings. We urge, however, that any grant of power to adjudicate concerning liens attached at the time of bankruptcy, must be subject to the requirement of due

process. While any action concerning the actual estate of the debtor does proceed in rem, any action involving a pre-existing lien must at its inception be in personam.

Section 54:27–4 of the New Jersey Revised Statutes provided:

> "These taxes shall be a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this state. The lien shall take effect on June first of the year in which the tax is payable and shall be a debt due from the company to the state on that date for which an action at law or suit in equity may be maintained, and shall be a preferred debt in case of insolvency. These remedies are in addition to the special proceedings provided for in chapters 19 to 29 of this title (§54:19–1 et seq.):"

As we have shown, a State as an attribute of sovereignty may provide adequate means for protecting its taxes. The means employed by the State has been in effect for nearly fifty-five years when the present proceedings were started. In 1884 it was provided (P. L. 1884, chap. 101, sect. 12),

> "the sum of the estimates or computation for each company shall constitute the tax to be paid by each company, and shall be a lien paramount to all other liens upon all the lands and tangible property and franchise of such company in this state; such lien shall take effect on the first day of December;"

There can be no dispute concerning the time when the liens attached in this case. The time element is important and the case was presented to the Court below so as to make the distinction clear. The State showed the difference between a case where a State had liens at the time of bankruptcy and a case where there were no liens such as in the

oft-cited case of *New Jersey* vs. *Anderson*, 208 U. S. 483. We then went on further to distinguish a situation where liens had already attached from a situation where something must be done subsequent to bankruptcy in order to have a lien attach. A supposititious case was described as follows: Let us suppose that instead of filing its petition on October 30, 1939, the Debtor had filed on May 30, 1939. The argument heretofore advanced by the State would still apply to 1932 to 1938 taxes, the latest of which in such event would have become affixed on June 1, 1938. But the taxes for 1939 would be in a wholly different position and, if this were an ordinary case of liquidation in bankruptcy, would require altogether different treatment. Since the 1939 taxes could not become a lien until June 1, 1939, the Court would have received custody of the property on May 30, 1939, subject only to the 1932 to 1938 taxes. By such custody the Court would have placed a protective wall around the estate of the Debtor, including the title and possession, and the State could not get through that protective wall in order to have its lien attach for 1939 taxes unless it obtained the permission of the Court to do so.

We made the same distinction above in this brief and made the point that, if we were concerned with liquidation, the State's position with respect to the 1939 taxes, in our supposititious case, would be exactly the same as that of the holder of any unsecured claim in so far as jurisdiction is concerned. It would have to consent to the jurisdiction of the Court for the purpose of asserting its right to have a lien for 1939 taxes, since such lien was not in existence when the Court took custody. Of course, in such an event, the State would not be urging its priority under Section 64 but under Section 67 or other provision of the Act. The above has been presented to show the importance of the distinction in an ordinary case. We believe that, in a railroad reorganization proceedings under Section 77, any taxes coming due and payable after the filing of the petition

are administration charges. Also actually the lien for 1939 taxes had attached months prior to bankruptcy.

The distinction is carefully preserved in the New Jersey statute. Whereas, the State had a lien for taxes on property used for railroad purposes on June 1 of each year for which the tax was levied, its lien on other property of the Debtor attached as follows:

> "As to any other property of the company or persons, the judgment and execution shall constitute or become liens in the same manner and to the same extent as other judgments and executions of the supreme court." (N. J. R. S. 54:28–5.)

We respectfully urge, therefore, that the question of the time of the attaching of our liens upon the property of the Debtor used for railroad purposes is free from doubt. All attached long before the filing of the petition of October 30, 1939.

A. *If Congress intended to include a State having liens for taxes at the time of bankruptcy as a creditor in Section 77 proceedings, then any such inclusion must be subject to the State's consent, otherwise the said section is to that extent unconstitutional.*

The cases setting forth the doctrine of the independence of the national and State governments within their respective spheres are set forth at length in *Ashton* vs. *Cameron County, supra*, pg. 528, et seq. *Texas* vs. *White*, 7 Wall. 700, 725; *Collector* vs. *Day*, 11 Wall. 113, 125, and *Indian Motor Cycle* vs. *United States*, 283 U. S. 570, 575, are examples. The Court then went on to say (pg. 530):

> "The power 'to establish • • • uniform laws on the subject of Bankruptcies' can have no higher rank or

> importance in our scheme of government than the power to 'lay and collect taxes.'"

This Court was there speaking of the power of Congress to "lay and collect taxes." We respectfully urge that the power of the State to lay and collect taxes is of equal rank and dignity. No interference with such power should be countenanced beyond that necessary to the proper protection of the estate of the bankrupt as that estate has been generally understood since the inception of bankruptcy laws—the debtor's or bankrupt's equity in encumbered property plus his unencumbered property.

We have set out above in sub-point D (2) of Point III our argument to the effect that Congress could not without violating the constitutional rights of the State of New Jersey compel the State to participate without its consent in a plan of reorganization (pgs. 69 to 77). We repeat that argument here.

We respectfully urge that, if this Court does find that Congress intended a State having liens for its taxes to participate in a plan of reorganization, the Court must somewhere spell out the requirement of consent, otherwise the said section is to that extent unconstitutional. Whether that consent is to be inferred from the process clause of Section 77 (a),

> "Process of the Court shall extend to and be valid when served in any judicial district."

or whether it may be inferred from the distinction which we have already made between grant of power and exercise of power or whether upon some altogether different basis, we do not venture a guess. We believe that it is the duty of the petitioner to show the appropriate language connoting the requirement of consent, otherwise the State of New Jersey may not under any circumstances be made to participate in any plan of reorganization under Section 77.

B. *If Congress intended to give the Bankruptcy Court power summarily to adjudicate concerning such tax liens, such grant of power is likewise subject to the State's consent for otherwise such grant of power would violate the right of the State to be immune from suit without its consent.*

We have pointed out at length that the State's liens had all attached at the time of the filing of the Section 77 petition on October 30, 1939. We have also shown at page 28, above, that the trustee took the property of the debtor in the same "plight and condition" in which the debtor held it prior to the said filing, *Thompson* vs. *Fairbank, supra,* and that such was the limit of the "estate in custodia legis."

(1) *The Bankruptcy Court cannot obtain jurisdiction to adjudicate concerning rights in property arising out of liens existing at the time of bankruptcy until the lien-holder has been made a party to the proceedings.*

Since the trustee in bankruptcy takes property subject to all liens existing at the time he takes custody of such property, it necessarily follows that before the Court can make any adjudication concerning the interests of any such lienor, it must obtain jurisdiction over such lienor. This was settled in *Factors' & Traders' Insurance Company* vs. *Murphy,* 111 U. S. 738 (1884), where the Court said at page 742:

> "We are of opinion, with the Supreme Court of Louisiana, that the record in this case does not show such service of process or other notice as makes Mrs. Murphy such a party to the bankruptcy proceeding as binds her to the sale and discharges of her lien. The case of *Ray* vs. *Norseworthy,* 23 Wall. 128, is conclusive on that subject, and is, we think, sound in principle."

In re Platteville Foundry & Machine Co., supra, 147 F. 828 (D. C. Wis., 1906); *In re Sanborn,* 96 F. 551 (D. C. Vermont, 1899); and *In re Pittelkow,* 92 F. 901 (D. C. Wis., 1899); are all authority for the rule that the lien interest of a lienor cannot be affected unless such lienor is made a party to the proceeding. He is not such a party by the mere institution of such proceeding.

The rule could not be otherwise, else the constitutional rights of a lienholder would be violated. As was said in *Louisville Joint Stock Land Bank* vs. *Radford,* 294 U. S. 555, 589:

> "The bankruptcy power, like the other substantive powers of Congress, is subject to the Fifth Amendment."

In *VanHuffel* vs. *Harkelrode,* 284 U. S. 225, the Court said that the selling of property of a bankrupt free of liens and transferring the liens from the property to the proceeds was the exercise of a lesser power than that of adjudicating the amount and validity of the liens. If, therefore, a sale free of liens without making the lienor a party is not binding on the lienor, as was held in the foregoing cases, a fortiori, the adjudication of the amount and validity of such liens, as is here proposed to be done, could not be binding upon a lienor unless such lienor had been served with process or other notice sufficient to satisfy the process clause and the Court had obtained the necessary jurisdiction over such lienor. We urge that in a case where a lien has attached at the time of the institution of proceedings under Section 77, the trustee in bankruptcy must be the moving party and must take adequate steps by process or other notice sufficient to satisfy the process clause in order to make the holder of any lien a party. Unless this be done, no adjudication or determination intended to be binding upon such lienor may be made.

In conclusion of this sub-point, we urge that the rule that the Bankruptcy Court takes property of bankrupts subject to existing liens of private lienors, and the rule that it can make no adjudication affecting such liens without obtaining jurisdiction over such lienors, must certainly apply with equal force when the statutory lien interest of a sovereign State is involved, particularly where as in the instant case that lien is paramount to all other liens. As was said in *Thomas* vs. *Woods*, 173 Fed. 585, 594 (C. C. A. 8th, 1909), wherein it was held that the Bankruptcy Court took the property of a bankrupt subject to the dower right of the bankrupt's wife:

> "If rights resting wholly upon private negotiation are safe, can any reason be assigned why a right created by statute in furtherance of the public policy of a State should not also be secure?"

We respectfully urge that on October 30, 1939, the Bankruptcy Court obtained jurisdiction of the property of the Debtor used for railroad purposes in the State of New Jersey subject to the pre-existing liens and that, before any binding adjudication could be made concerning any of such liens, the lien-holder must be made a party.

(2) *Since the tax liens of the State had attached prior to the institution of Section 77 proceedings, no such jurisdiction may be acquired without the State's consent.*

On October 30, 1939, the State had paramount liens for taxes upon the properties of the Debtor for the years 1932 to 1939, the latest of which had attached five months prior to the commencement of the present Section 77 proceedings. On that date could the State of New Jersey be compelled to submit against its will to the jurisdiction of the Bank-

ruptcy Court for the purpose of having the said Court adjudicate concerning the amount and validity of its tax liens, most of which had already been sustained by judgments, certiorari to review which had been denied by this Court? (Pg. 3 above.) We urge that the Bankruptcy Court has no such power either as an incident of the broad power contained in Section 77 with respect to reorganization or as an incident, as claimed by the Petitioner, of any inherent power in the Bankruptcy Court to consider any matter affecting the debtor's estate.

In *Arkansas Corporation Commission* vs. *Thompson*, 313 U. S. 132, 145, it was said:

> "But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as super assessment tribunals over State taxing agencies."

There is no doubt that on the merits of this case, the State would ultimately prevail. To prevent, however, the necessity of submitting to expensive and burdensome litigation on matters long since declared by the Federal Courts to be res judicata, we urged our constitutional immunity in that any attempt to compel the State to submit to such jurisdiction would be a suit against the State.

Any person seeking to have such determinations made must be considered to be the moving party. He would be seeking to have binding adjudication made against the State in judicial proceedings, the making of which must constitute judgments in a suit or suits against the State. We urge that no Court can entertain such a suit unless the State consents thereto. (See cases sighted infra.)

It is not accurate to say that the State is seeking to establish rights in something that is presently within the custody of the Trustee and under the jurisdiction of the

Bankruptcy Court, and that, therefore, the State is the moving party, as was urged by the Trustee below. The contrary is the fact. The rights of the State of New Jersey, represented by its tax liens in and to such properties, were not brought within the jurisdiction of the Bankruptcy Court by the filing of the Section 77 proceedings on October 30, 1939. The Trustee did not take title to the lien interests of the State, *York Mfg. Co.* vs. *Cassell, supra; Platteville Foundry and Machine Company, supra,* but only that equity which the Debtor had immediately prior to the inception of the proceedings. The Trustee took the property in the same "plight and condition" that the Debtor had held it. *Thompson* vs. *Fairbanks, supra.*

Since the Bankruptcy Court did not have jurisdiction to adjudicate concerning the lien interests of the State in and to such property without the State being made a party to the proceedings, the said Court could not obtain such jurisdiction unless the State had consented to be made a party thereto.

It is thoroughly established that a sovereign State may not be sued in a Federal court without its consent, either by a citizen of the State, or by a citizen of another State, the freedom from suit by a citizen of another State being based upon the Eleventh Amendment to the United States Constitution, and the freedom from suit by a citizen of the State itself being based upon the inherent nature of sovereignty which prevents action against a State by its own citizens without its consent. *Hans* vs. *Louisiana,* 134 U. S. 1; *North Carolina* vs. *Temple,* 134 U. S. 22 (1889); *Hopkins* vs. *Clemsen College,* 221 U. S. 636 (1910); *Fitts* vs. *McGhee,* 172 U. S. 516 (1899); *Georgia* vs. *Jesup,* 106 U. S. 458 (1882); *Ex Parte State of New York,* 256 U. S. 490; *Murray* vs. *Wilson Distilling Co.,* 213 U. S. 151 (1909); *Worcester County Co.* vs. *Riley,* 302 U. S. 292 (1937); *Minnesota* vs. *United States* (1938), 305 U. S. 382.

A clear statement of the basis for the rule is to be found in the very recent case of *Great Northern Life Insurance Company* vs. *Read*, 322 U. S. 47 (1944), wherein Mr. Justice Reed said for this Court (pp. 51, 54):

> "Efforts to force, through suits against officials, performance of promises by a State collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. *Monaco* vs. *Mississippi*, 292 U. S. 313, 320, *Louisiana* vs. *Jumel*, 107 U. S. 711, 720. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents action against a State by its own citizens without its consent. *Hans* vs. *Louisiana*, 134 U. S. 1, 10, 16.
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> . . . . . .
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> "When we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the State's intention to submit its fiscal problems to other courts than those of its own creation must be found."

What constitutes a suit against a State is not circumscribed within any narrow or technical limits. In *State of Missouri* vs. *Fisk*, 290 U. S. 18 (1933), the Court held that the immunity of a State from suit extends to any proceedings wherein process is issued against a State

> "to compel it to subject itself to the court's judgment, whatever the nature of the suit."

In *Minnesota* vs. *United States*, *supra*, a proceeding against property in which the sovereign had an interest was prohibited. In *Worcester County Trust Co.* vs. *Riley*,

supra, a bill of interpleader was held to come within the prohibition.

In *Palmer* vs. *Ohio,* 248 U. S. 32, 34 (1918), the Court held that the State law, as the applicable local law is conclusive on the subject of consent to be sued. The limits to which the State of New Jersey goes in protecting itself from being subjected to process at the instances of private persons is shown in *Lodor* vs. *Baker, Arnold & Company,* 39 N. J. L. 49. In that case money of the defendant, admitted to be due to such defendant, was being held by the State treasurer. The plaintiff caused the said money to be attached. The writ of attachment was quashed on the ground that the "right to attach must necessarily involve the right to compel the State to appear as a party defendant at the suit of a private individual." The Bankruptcy Court is subject to the same general rule that a State cannot be made a party to any proceedings without its consent.

The Trustees and Intervenors have heretofore contended that the bankruptcy law is the paramount law of the land and that the State can be bound by the adjudications of the Bankruptcy Court regardless of its consent. In reaching this conclusion they fail to distinguish between a grant of power to the Bankruptcy Court, and the propriety of the exercise of that power in a particular case. We concede that the State cannot make bankruptcy laws. But we are not dealing here with a question of State jurisdiction over bankruptcy matters. We are dealing with the alleged conflicting rights in property of the State and private individuals, which rights were established prior to bankruptcy. The right to exercise any power under the Bankruptcy Act with reference to such conflicting rights is governed by the fundamental rule that requires jurisdiction over the person of the State before any such power may be exercised. We are not concerned with the quality of service. No matter how slight the requirement it nevertheless constitutes the commencement of a suit against the State. No matter how

informal the type of notice, it still must satisfy the requirement of due process and the issuance of such process, call it notice or what you will, constitutes the institution of such suit.

We respectfully submit that Congress received no right or power under the bankruptcy clause of the United States Constitution which may be construed as authority to grant the claimed power or that was intended to impair the principle of a sovereign State's immunity from suit by any individual unless the said State consents thereto. It should be remembered that the Eleventh Amendment to the Constitution was adopted for the specific purpose of preventing the Federal courts from ever again (as in *Chisholm* vs. *Georgia*, 2 Dall. 419) taking jurisdiction over a cause affecting the conflicting rights of a State and individuals without the consent of such State. Since the bankruptcy powers of Congress were contained in the original Constitution, and the Eleventh Amendment came later, any conflict or inconsistency between the bankruptcy power and the immunity of sovereign States from suit must be resolved in favor of the principle of immunity.

As the petitioner has pointed out (B. pg. 61), this Court has made clear that courts of bankruptcy are essentially courts of equity, citing *Pepper* vs. *Litton*, 308 U. S. 295; *Prudence Realization Corp.* vs. *Geist*, 316 U. S. 89, and *Heiser* vs. *Woodruff*, 66 S. Ct. 853. With this we heartily agree. And this cause is a suit in equity as contemplated by the said Eleventh Amendment.

The immunity of a State from suit by individuals without its consent cannot be taken away by any provision of the United States Constitution or by Federal laws enacted pursuant thereto. In *Palmer* vs. *Ohio, supra*, 34, the Court said:

> "The right of individuals to sue a State in either a federal or a state court, cannot be derived from the

Constitution or laws of the United States. It can come only from the consent of the State."

In *Ex Parte New York, supra,* involving the attempted exercise against a State of the admiralty jurisdiction of a Federal court, which is also derived from the United States Constitution, the Court said at page 497:

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

And again at page 502:

> "The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. *Chelentis* vs. *Luckenbach S. S. Co.*, 247 U. S. 372, 382, 384. It is not inconsistent in principle to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction."

If any person seeks to have the State's pre-existing tax liens adjudicated, such persons must bring the State within the jurisdiction of the Court if any such adjudication is to be binding upon such State. As was said by this Court in *Missouri* vs. *Fiske, supra,* at page 28:

> "The exercise of the judicial power cannot be protected by judicial action which the Constitution specifically provides is beyond the judicial power. Thus, when it appears that a State is an indispensable party to enable a Federal court to grant relief sought by private parties, and the State has not consented to be sued, the court will refuse to take jurisdiction. *Cunningham* vs. *Macon & B. R. Co.,* 109 U. S. 446, 451, 457, 27 L. ed. 992, 994, 996, 3 S. Ct. 292, 609; *Re Ayers, supra* (123 U. S. p. 489, 31 L. ed. 224, 8 S. Ct. 164; *Christian* vs. *Atlantic & N. C. R. Co.,* 133 U. S. 233, 244, 33 L. ed. 589, 593, 10 S. Ct. 260; *Stanley* vs. *Schwalby,* 147 U. S. 508, 518, 37 L. ed. 259, 263, 13 S. Ct. 418; *South Carolina* vs. *Wesley,* 155 U. S. 542, 545, 39 L. ed. 254, 255, 15 S. Ct. 230; *Belknap* vs. *Schild,* 161 U. S. 10, 20, 50 L. ed. 599, 602, 16 S. Ct. 443. And if a State, unless it consents, cannot be brought into a suit by original bill, to enable a Federal Court to acquire jurisdiction, no basis appears for the contention that a State in the absence of consent may be sued by means of an ancillary and supplementary bill in order to enforce a decree."

And again at page 28:

> "The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no grounds for the issue of process against a non-consenting State. If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event, its rights will receive the same consideration as those of

other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit. See *The Siren*, 7 Wall. 152, 154, 19 L. ed. 129, 130; *The Davis*, 10 Wall. 15, 19, 19 L. ed. 875, 876; *Georgia* vs. *Jesup*, 106 U. S. 458, 462, 27 L. ed. 216, 218, 1 S. Ct. 363; *Cunningham* vs. *Macon & B. R. Co., supra* (109 U. S., p. 452, 27 L. ed. 994, 3 S. Ct. 292, 609; *Re New York, supra* (256 U. S., pp. 497, 500, 65 L. ed. 1061, 1062, 41 S. Ct. 588.)"

See also *Central Railroad* vs. *Martin, supra* (115 F. (2d) 968).

In conclusion of this sub-point, we respectfully submit that the relief sought by the Trustees in their petition of August 12, 1944, insofar as it seeks any adjudication concerning the tax liens of the State which were affixed prior to October 30, 1939, constitutes a suit against the State of New Jersey and may not be maintained unless the State has consented thereto.

(C) *If Congress did intend that a State having paramount liens for its taxes which had attached prior to the institution of Section 77 proceedings, may be made a party without its consent, to that extent, Section 77 is unconstitutional.*

If Congress did intend that, regardless of the rule concerning the sovereign immunity from suit, a State must become a party to Section 77 proceedings, or failing to do so, shall or may be deprived of all interest in the properties subject to its liens, then, and to that extent, Section 77 is unconstitutional. It needs no further argument to establish the point that the taxes involved in the instant case were levied by the State of New Jersey for public purposes. They are property taxes upon properties located within the State of New Jersey. The State was acting within the

limits of its constitutional power in levying such taxes. *Central Railroad Co.* vs. *Martin, supra.*

As was said by this Court in *Ashton* vs. *Cameron County, supra,* at page 531:

> "But nothing in this tends to support the view that the federal government, acting under the bankruptcy clause, may impose its will and impair state powers —pass laws inconsistent with the idea of sovereignty."

The later case of *United States* vs. *Bekins, supra,* has not changed the rule so far as consent is concerned. It is difficult to conceive of any case where Congress would more effectively interfere with the sovereign powers of the State of New Jersey than would be the case if Congress were to grant power to the Bankruptcy Court to determine and adjudicate concerning the State's pre-existing tax-lien interests, long since passed upon by courts of competent jurisdiction. Nor could there be a greater encroachment upon State powers than would exist if the said State is deemed to be a claimant and creditor under such section, and so subject to having its tax liens satisfied in some manner to be determined by the Interstate Commerce Commission and the Bankruptcy Court, but other than by payment of cash in full.

We respectfully urge that, if it was intended by Congress that a State having tax liens should be deemed to be a creditor under Section 77 proceedings, Congress also surely intended that the State must consent before it can be made a party to such proceedings. To support such conclusion we again refer to *Arkansas Corporation Commission* vs. *Thompson, supra,* wherein it was said:

> "But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the Federal Courts up as

super assessment tribunals over State taxing authorities."

In *Palmer* vs. *Massachusetts, supra,* this Court, spoke of the need of wariness in the construction of language which implicates a recurring phase of our federalism and "involves striking a balance between national and state authority in one of the most sensitive areas of government." In that case this Court held that the power may not be found unless there be clear and definite words to that effect. There are no definite words in our case and we believe that any interpretation placed upon the language of Section 77, which would permit the State to be made a party without its consent, under the facts of the instant case, would be contrary to this time-honored principle.

As pointed out above, it is well established that a Court will not arrive at a construction of an act which renders it unconstitutional, unless clearly compelled to do so by the expressed language of the statute. *Plymouth Coal Co.* vs. *Pennsylvania, supra; United States* vs. *Jim Fuey Moy, supra; The Abbey Dodge* vs. *United States, supra.*

We have stated above that in our belief Congress never intended that the Bankruptcy Court should, in Section 77 proceedings, have the power to make the determination and adjudication concerning the State's pre-existing tax liens sought by the Petitioner without the State's consent. (pg. 70.) We again repeat that argument. But if such power were intended to be granted, either by Section 77 or any other section, any such grant of power with respect to such pre-existing liens must be subject to the State's consent, otherwise such grant of power would be unconstitutional.

POINT VII.

The State of New Jersey has not consented to have the Bankruptcy Court determine the amount and validity of its tax liens.

We need only consider the question whether the State has consented to participate in the present proceedings if this Court has first determined that the State's tax lien interests were not brought into Court by the mere institution of the proceedings and the consent of the State must be given before it can be made a party. Thus we consider the question of consent in the light of the circumstances that the State's tax lien interests are not within the jurisdiction of the Court and some positive act of the State is necessary to confer jurisdiction.

As we have shown above, it has been established by this Court that, before a State may be made a party to any suit at law or equity, the said State must consent thereto. It has been held that such consent may not be inferred and in *Ford Motor Company* vs. *Department of Treasury of Indiana*, 65 S. Ct. 347 (1945), that the State's immunity from suit may be even raised for the first time in this Court. Where then is the consent?

(A) *No New Jersey statute or constitutional provision authorizes the participation of the State in Section 77 proceedings in a case where the State has liens for its taxes.*

The Trustees have been unable to point to any New Jersey statute or constitutional provision authorizing any officer of the State to consent to the State's participation in these proceedings with respect to the State's tax liens. No such provision exists. Without such specific authority no effective consent can exist. *Strobel Steel Construction Company* vs. *State Highway Commission*, 120 N. J. L. 298.

(E & A 1938.) The New Jersey law, as the applicable local law, is conclusive on the subject of consent to be sued. *Palmer* vs. *Ohio, supra.*

(B) *The State Comptroller was not authorized to prosecute the enforcement of the State's railroad tax liens in this or any other proceedings, nor authorized to consent to any adjudication concerning such tax liens.*

On page 15 (R. pg. 37) of his interim report, the Master stated that the Court had jurisdiction over the kind of claims asserted by the State. He apparently adopted the contention of the Trustees that the State Comptroller has prosecuted a demand on behalf of the State against the assets of the Debtor by filing proofs of claim on behalf of the State. But what assets? Certainly they cannot mean those assets which we have demonstrated are not within the jurisdiction of the Court.

We have shown that as of October 30, 1939, the lien interest of the State was outside the jurisdiction of the Court —that the commencement of the reorganization proceedings did not, properly construing the Bankruptcy Act, and could not, constitutionally construing such Act, bring such interest within such jurisdiction without the State's consent. Nothing transpired between October 31, 1939, when the proceedings began, and December 15, 1940, when the Comptroller's proofs of claim were filed to change that condition. No officer of the State had authority to consent to any such jurisdiction. During that period, therefore, the Bankruptcy Court was powerless to make any adjudication respecting the State's liens.

The Trustees have contended that, conceding the existence of that status on December 15, 1940, the action of the Comptroller on that day brought the State's liens within the jurisdiction of the Court. We proceed to address our attention to that contention.

It is freely admitted that the Comptroller is vested by statute with the power and duty to superintend the collection and protection of the State's revenues. R. S. 52:19–10; 52:19–15. It is well settled, however, that a public officer's statutory powers and duties must be strictly construed. *Newark* vs. *Civil Service Commission,* 115 N. J. L. 26, 29, 177 Atl. 868 (Sup. Ct. 1935).

The question now presented is not one having to do with general supervision over the protection of the State's pecuniary interest, but, rather, as to the existence of specific authority to enforce the State's statutory liens for unpaid railroad taxes.

That subject is specifically provided for in detail in R. S. 54:28–1 to 54:28–6. These sections make it mandatory for the Attorney-General to enter a judgment in the Supreme Court for unpaid taxes after ten days default. Provision is then made for the sale of the property of the taxpayer in satisfaction of the tax by a Master in Chancery. These acts clearly imply a lack of power in any other State official to take any action with respect to the State's railroad tax liens which would prejudice the exclusive right and duty of the Attorney-General to enforce such tax liens in the manner specifically provided therein. The argument of petitioner to the effect that there were three alternative methods is without merit. The action in debt is additional and simply is the method of providing for personal liability where otherwise the collection of tax would be limited to the value of the particular property taxed. (See pg. 44 above.)

Clearly authoritative in this connection is the language used by this Court in *Great Northern Life Insurance Co.* vs. *Read, supra* (pg. 54). The limited functions of the Comptroller in this connection are further emphasized by the proviso in R. S. 54:28–1 that the Comptroller shall certify the amount of the tax delinquency prior to the entry of judgment or execution therefor by the Attorney-General. *Expressio unius est exclusio alterius.*

The petitioner has answered his own argument when he argues (pg. 85) that by the State officers' action, the State has lost its lien. Who could argue seriously that any officer of the State was so empowered? Before any such contingency would be permitted, clear and unmistakable language must be shown to this Court.

Since, therefore, the Comptroller possessed no authority to enforce the lien claims in question, no action by him in these proceedings can be construed as a request by the State for the enforcement of those liens by this Court. *Minnesota* vs. *U. S., supra, Adams* vs. *Bradley,* 1 Fed. Cases 93; 5 *Sawy,* 217, 219 (C. C. 1878); *O'Connor* vs. *Slaker,* 22 F. (2d) 147, 152 (C. C. A. 8th 1927); *Title Guarantee & Surety Co.* vs. *Guernsey,* 205 Fed. 94, 95 (D. C. Wash. 1913). Of course enforcement in our case; which meant the sale of the property, would be contrary to the whole scheme of reorganization and could not have been allowed even had it been requested, for as pointed out by this Court in *Continental Bank* vs. *Rock Island, supra* (pg. 671), "a railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if at all, as a unit and as a going concern." Obviously since the State has only a paramount lien upon properties in railway use in the State of New Jersey, enforcement in any Court would defeat this aim and would be inconsistent with any scheme of reorganization.

The Comptroller could not of course have been demanding that which the State already had—its paramount liens for taxes—for we must remember that we are only concerned at this point in our argument with the facts alleged to constitute consent under the circumstances that the Court had no jurisdiction over that paramount interest of the State and that consent is necessary in order to confer jurisdiction.

Nor is the argument of the Trustees that the Attorney-General has made appearances in these proceedings in be-

half of the State's claims of any avail. That officer is subject to the same rule of strict construction of his statutory duties and powers as is the Comptroller. The Attorney-General may enforce railroad tax liens only in the manner set forth in R. S. 54:28–1 et seq.; *Great Northern Life Insurance Co.* vs. *Read, supra.* There being no ambiguity in this act, there is no occasion for the application of the rule of practical construction of ambiguous legislation, invoked below by Trustees. See *State* vs. *Wrightson,* 56 N. J. L. 126, 206, 28 Atl. 56. (S. Ct., 1893.)

The limitations upon the power of an Attorney-General to bind the State was quite recently discussed in *Ford Motor Company* vs. *Dept. of Treasury of Indiana, supra.* As we stated above, the State's immunity was raised for the first time in that case when the matter came before this Court.

C. *The filing of the proofs of claim merely constituted notice to the trustees of the existence of the State's tax liens and laid the basis, in the event of the applicability of Section 64, for making a claim in the event the liened property was insufficient to pay in full the taxes and interest due the said State.*

The need for keeping separate the consideration of the several phases of the present inquiry must now have become apparent. We have an altogether different concept of the construction to be placed upon the actions of the State's fiscal officers when we realize that the interest of the State of New Jersey as represented by its tax liens were not within the custody of the Trustee and so within the jurisdiction of the Court at the time of the filing of the so-called proof of claim, and that no step need be taken by such officers to protect the said lien interests of the State. Having in mind then the statutory limitations on the power of the Comptroller with respect to the enforcement of the

State's railroad tax liens, and having in mind that the State's lien interests were not within the jurisdiction of the Court, the question arises as to the effect of the said Comptroller's action in filing the claims. The filing of the said proofs must be construed merely as a notice to the Trustees and the Court that the State has liens for its taxes that were outside the jurisdiction of the Court, and to lay the basis for the making by the Comptroller of a claim on behalf of the State for any deficit that might arise in the event that the property of the Debtor should not be sufficient to satisfy the tax liens. (How any such deficit could be established without liquidation we do not know. However the notice would be in keeping with careful business practice.) The proofs do disclose that the State asserted its lien. It is significant that the petitioner in its petition of August 14, while setting forth the objections to the State's proof of claim subsequent to the determination in *Central Railroad Co.* vs. *Martin*, 115 F. (2d) 968, conveniently omitted the Comptroller's reply denying jurisdiction. (R. pg. 245-12.)

It is fundamental in the law of bankruptcy that a claimant must exhaust his security before he can assert a claim against the assets that are in the custody of the Court. *In re Hagin, supra, New York Trust Co.* vs. *Palmer, supra.* The latter case which was a Section 77 reorganization clearly supports our views concerning this matter. In our case, the Comptroller had no authority to do anything more than make demands against general assets when a deficit should be proved. He had no authority to bring the State's liens within the jurisdiction of the Court. Nor does the filing of the proof of claim and participation in bankruptcy proceedings waive any right of the State to rely upon its security where, as here, the proof of claim specifically called attention to the State's lien, *Thomas* vs. *Taggart*, 209, U. S. 385. (1908.)

It being the rule that the security must be exhausted before any claim be made against the assets in the custody of the Court *(New York Trust Co.* vs. *Palmer, supra)*, and it being the rule that

> "a claim proven as a secured claim is always potentially an unsecured one. If the security fails in whole or in part the equity of the case will generally require that recognition be given the unsecured debt." *McAbee* vs. *Isom*, 116 F. (2d) 1001 (C. C. A., 5th, 1940.)

it necessarily follows that the only power that may be attributed to the Comptroller, by reason of his general powers and in the absence of specific power, is with respect to a possible deficit. His only authority is to provide against the contingency that the security afforded by the lien is not sufficient to liquidate the whole tax debt, and it shall become necessary to make claim for such deficit.

The Comptroller could not, of necessity, make any estimate as to the amount of any such deficit, if in fact he contemplated any such deficit, since the enforcing authorities of the State were restrained by the Bankruptcy Court's order from enforcing the said tax liens—the only method given to the said Comptroller by law for proving the amount of the deficiency claim that the State might ultimately have to make against the general assets under Section 64 in the event that such section is at all applicable in Section 77 reorganization. We do not believe that any one has ever doubted that this Debtor would reorganize. In this connection we cannot help but comment on the argument of the Petitioner on pages 53 to 56 of his brief. Cases concerned with the inaction of taxing officials and taxing authorities slumbering on their rights have no place in our argument. It cannot ever be said other than that the State of New Jersey has constantly pressed the matter.

The very limited scope of any review by the Bankruptcy Court in the event it should have become necessary to press a claim under Section 64, is set forth in *Henderson County* vs. *Wilkins*, 43 F. (2d) 670, 672 (C. C. A., 4th, 1930). The Court said concerning such limitation in a case where a claim for taxes was made against general assets:

> "Its action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid on the claim for taxes from the assets of the estate in its possession. *In re E. C. Fisher Corporation* (D. C.), 229 F. 316, 318."

Thus even if Section 64 is applicable in these proceedings, its application is limited to any claim the State may make against general assets available for unsecured claimants and, in any review of such claim by the Bankruptcy Court, the said Court could determine only whether the State is entitled to a share of such general assets. Beyond that the said section confers no power on the said Court.

In conclusion of this point, we therefore urge that, since the Court did not have jurisdiction of the State's rights in the property of the Debtor as represented by its pre-existing tax liens, it must be apparent that the action of the Comptroller could only have been intended at most to constitute a potential demand against assets which were within the custody of the Court (those not affected by the State's pre-existing liens and available for distribution to unsecured creditors). The said Comptroller was powerless to in any way affect such pre-existing lien interest of the State. That lien interest has never been brought into Court, may not be brought into Court without the State's consent and the State has never consented nor authorized anyone to give the consent necessary in order to confer jurisdiction on the Bankruptcy Court over the said State with respect thereto.

POINT VIII.

Even if Congress intended that Section 64 should be applicable in Section 77 proceedings, the Bankruptcy Court, under the rule of *Arkansas Corporation Commission* vs. *Thompson, supra*, is without power to make the determinations sought by the petition of August 14.

As stated above, the Trustees in their argument below and the Master in his Interim Report considered Section 64 as the source of authority for the Bankruptcy Court to make the review sought by the Trustees in their petition of August 14. A similar question was before this Court in *Arkansas Corporation Commission* vs. *Thompson, supra.* In that case this Court said that it was unnecessary to decide whether the said Section 64 is applicable to Section 77 proceedings because, conceding the applicability of the said section generally, the Bankruptcy Court was without jurisdiction to review the disputed tax assessments for the reason that an adequate judicial review was afforded by the laws of the taxing State. This Court said at page 144:

> "If the trustee had availed himself of his right of appeal to the courts of Arkansas, with an ultimate right of appeal to this Court for final determination of federal questions, it is difficult to believe that it would now be seriously argued that Congress, by § 64 (a) (4), intended to impose upon the bankruptcy court the unusual power and delicate duty of trying out afresh the facts found by the state with relation to the value of property. And there is no more reason to assume that Congress intended that the bankruptcy court should fail to give respect to an unappealed determination of value made by the Arkansas Corporation Commission."

The Circuit Court of Appeals below recognized that there is in the instant case a factual situation similar to that suggested by Mr. Justice Black for this Court in the just mentioned citation. It does not seem possible that anyone can seriously contend that, in the light of the litigation that has gone before concerning the 1932 to 1939 taxes, the petitioner can have any right to contest further the New Jersey tax assessments for such years in any court.

The Court below did not pass upon the several questions raised by the State concerning the nonapplicability of the several sections of the Bankruptcy Act with respect to the pre-existing tax liens of the State, nor did that Court pass upon the State's claim of immunity from suit. Just as this Court, in the *Arkansas Corporation Commission* case, said that it was unnecessary to determine the applicability of Section 64 to Section 77 proceedings, so did Judge McLaughlin in effect say that it was unnecessary to answer the objections to jurisdiction made by the State, for the reason that, conceding that all questions should be decided adversely to the said State, yet the Bankruptcy Court, under the facts and law of the instant case, only had power to review the assessments made by the State to determine whether or not there was mathematical error in computation. We agree with the Court below that the *Arkansas Corporation Commission* case would preclude any assumption of jurisdiction in a case such as ours. We respectfully urge however, that this Court said in the just mentioned case that any Federal questions involved would come to this Court by way of appeal from the State's highest court (pg. 144) and did not say that errors of law could be reviewed by the Bankruptcy Court in Section 77 proceedings where an adequate review is afforded in the State courts.

The Court below described in detail the steps provided by the New Jersey laws for a review of the tax assessments upon railroad properties. Because we are not forced to rely upon the adequacy of the State procedure in order to

substantiate our position in the instant case, but can properly rely upon the broad statement of principle expressed by this Court in the last mentioned citation having to do with fact that the Debtor has actually resorted to the State courts, we have not set out the details of the procedure for review afforded by the New Jersey Act, but are content with the statement of such procedure contained in the opinion below (R. pg. 158). (See also Appendix pg. 133.)

The State of New Jersey does maintain however that such procedure is wholly adequate. Such procedure has been in effect for many, many years. There have been many reviews by the New Jersey Courts of the taxing methods during such years. In *Central Railroad Company* vs. *Martin*, 114 N. J. L. 69, 73, the Supreme Court commented as follows (1934):

> "Thus notwithstanding that this contest has been waging for almost 50 years; and that almost every possible phase of this litigious question has been brought to our courts (It is estimated that it has been so brought in excess of 100 times) and received their consideration * * *."

It may not be said that the New Jersey procedure for review of railroad taxes has not been adequate. We urge that it has fully satisfied the rules of this Court concerning such adequacy of review.

We have made this last comment because of the fact that our procedure is by certiorari, which method of review was commented upon by this Court in *Hillsborough Township* vs. *Cromwell*, 66 S. Ct. 445 (1946). In that case this Court mentioned the denial of certiorari in *Lehigh Valley Railroad Company* vs. *State Board*, 174 A. 359, 12 N. J. Misc. 673. We wish to point out that, in the *Lehigh Valley Railroad* case, the Court was dealing with locally assessed

property used for other than railroad purposes. The action was directed against the assessments made by municipal authorities, who under no circumstances make assessments in cases where property is used for railroad purposes. The Court was not dealing with taxes assessed under the New Jersey Railroad Tax Act for which a separate certiorari procedure was established. R. S. 54:26-11 et seq.

As a matter of practical exposition, the method of review by certiorari has proved adequate because, in the 60 years during which the present method of procedure has been in operation, certiorari has never to our knowledge been denied in a case involving property in railroad use. We have shown above the great number of times the railroad tax controversy has been before our Courts. That was in 1934. Since then, notwithstanding that the railroad companies had resorted to the Federal courts and that those courts had held on two separate occasions that all federal questions concerning the taxing methods employed by the State of New Jersey had been made res judicata by *Central Railroad Company* vs. *Martin, supra,* the New Jersey Supreme Court again in 1942 granted its writ of certiorari upon the application of the trustees for review of the 1942 taxes in *Shelton Pitney and Walter P. Gardner* vs. *State Board,* 134 N. J. L. 34. Writs have been issued on application of the Trustees again in 1943 and 1944 and are awaiting argument.

It is respectfully urged that, even if this Court should hold that Section 64 does apply to Section 77 proceedings generally, yet it must be held that Congress did not intend under the facts of the instant case to confer jurisdiction upon the Bankruptcy Court to review the tax questions here presented (1) because of the litigation that has already gone before; and (2) because in any event the instant case is well within the rule of *Arkansas Corporation Commission* vs. *Thompson, supra,* in that as a matter of practical operation the review afforded by the State law is wholly adequate to afford the Petitioner the full protection of the law.

POINT IX.

Congress did not empower the Bankruptcy Court summarily to adjudicate in Section 77 proceedings concerning the constitutionality or the applicability of the Settlement Acts with respect to the taxes due the State of New Jersey under the facts of the instant case.

The Petitioner states in his brief (pg. 68) that he has tried "to make it crystal clear" that this case in no way involves any question as to the assessed value of the debtor's property. In short the debtor raises no question as to the amount and validity of the taxes, the only matters concerning taxes stated specifically by Congress to be the subject of review under Section 64.

Just when it became "crystal clear" is a matter of speculation. Not until December 27, 1945, over one month after the determination of the Court below, did the said Petitioner admit that he was affected by the judgment of the Circuit Court of Appeals in *Central Railroad* vs. *Martin*, 115 F. (2d) 968. See "Modifications of Supplemental and Amended Objections" which we have included in the appendix to this brief (pg. 149). And notwithstanding such admission as to the years 1934, 1935 and 1936, and notwithstanding what was said by the Circuit Court of Appeals to the effect that the several questions had become res judicata, we find nothing in that pleading which changes the picture concerning their contentions with reference to 1937, 1938 and 1939. Of course it has been crystal clear for a long time to all those but those who would not see that there has not been any debatable issue concerning the propriety of the assessments of the taxes which are the subject of this controversy since 1939. (100 F. (2d) 139.) The New Jersey Court of Errors and Appeals has commented upon the "illusory" nature of their asserted rights. The Bank-

ruptcy Court has stated with respect to similar tax litigation that there must be "a proscription of futility." (36 Fed. Sup. 156, 160.)

It necessarily follows that the only matters which the Petitioner could have contemplated reaching through the petition of August 14 were those incident to the passage of the Settlement Acts. The Petitioner has given no authority whatsoever to support the claimed power of the Bankruptcy Court to entertain summarily such questions even were they now before the federal courts de novo. The Bankruptcy Court in the light of the facts of the instant case is proscribed from undertaking a consideration of the matter because of what has gone before. We therefore respectfully urge that:

A. *The petitioner has pointed to no section of the Bankruptcy Act which grants to the Bankruptcy Court the power to review the questions presented by the Settlements Acts.*

Section 64 even were it applicable to Section 77 proceedings authorizes the Bankruptcy Court to review the amount and validity of taxes only. Where, as here, there is no question left open concerning amount or validity, it may not be said that the power to make the requested review might impliedly exist as an incident to the grant of the specific power. We respectfully urge that questions concerning the applicability of the Settlement Acts may not be considered summarily because of any authority contained in the said Section 64. We believe that the case of *Palmer* vs. *Massachusetts, supra,* is applicable here and that, in the absence of specific authority, it must be held that Congress did not intend to grant the power herein claimed by the Petitioner.

B. *The matter having heretofore been before the Federal Courts and action withheld pending a determination by the State Courts, the Federal Courts will not now entertain jurisdiction for the purpose of determining questions of State law incident to the said determination by the State Courts.*

The Petitioner, anxious to enjoy the benefits of the amended Settlement Acts, petitioned the Bankruptcy Court and obtained Order No. 163 fixing the liability of the Debtor at the amount prescribed by the Settlement Acts. The matter was appealed by the State to the Circuit Court of Appeals. On that appeal the several questions urged here were presented. The relationship of the contesting parties was urged. It was argued that the Debtor had fully complied and that there was a binding contract between the Debtor and the State under State law founded upon adequate consideration. The Circuit Court (*In re Central Railroad Co., supra,* 136 F. (2d) 633) disregarded all arguments and held that the Bankruptcy Court should have "in the exercise of a nice discretion" awaited the outcome of the State Court litigation, stating that:

> "For we are here concerned with the much larger issues as to the appropriate relationship between federal and state authorities functioning as a harmonious whole." (pg. 638.)

Citing *Chicago* vs. *Fieldcrest Dairies,* 316 U. S. 168; *Railroad Commission* vs. *Pullman Co.,* 312 U. S. 496. This Court denied certiorari 320 U. S. 805. In *Spector Motor Co.* vs. *McLaughlin,* 323 U. S. 101, this Court had a similar question before it. Mr. Justice Frankfurter said for this Court at page 105:

> "And so, as questions of federal constitutional powers have become more and more intertwined with preliminary doubts about local law, we have insisted that

federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." Citing the *Pullman* case, the *Fieldcrest Dairy* case and our *Central Railroad* case.

There can be no doubt that the Circuit Court of Appeals intended to await the determination in *Wilentz* vs. *Hendrickson, supra.* There was only one case, one set of facts, one legislative act designed to relieve one group of people, who had collectively resisted the payment of their taxes. For the Federal Courts, in view of that determination, to undertake now to pass upon question of local law incident to that determination would be completely contrary to that sentiment so ably expressed above.

It must be remembered that this Court withheld determination in the *Spector* case in order to avoid, if possible, the necessity of determining Federal questions. We are not here concerned with such Federal questions. Can it be said that the Bankruptcy Court could with propriety now say that, as a matter of State law, the Settlement Acts are constitutional or that, as a matter of State law, the Treasurer must accept payment under the terms of the said Settlement Acts notwithstanding that a Chancery Court injunction permanently enjoins receipt of such payment?

The provisions of the Bankruptcy Act were never designed to permit the summary consideration by the Bankruptcy Court of matters such as those posed by the judgment of the New Jersey Court of Errors and Appeals concerning the unconstitutionality of the Settlement Acts. The Bankruptcy Court was therefore not authorized to undertake consideration of the matters presented by the petition of August 14th.

C. *In any event it is apparent that, since the only questions involved have to do with the alleged existence of a contract between the State and the Debtor, the petition of August 14th constitutes a suit against the State which may not be maintained without the State's consent.*

The Petitioner admits in his brief (pg. 69-70) that he seeks a determination of the validity of an asserted compromise with the State. We repeat what we have said above under sub-point VI-B concerning what constitutes a suit against the State. One need only read the first three prayers of the petition of August 14th to understand the nature of the present action. (R. pg. 62.) They do not seek to prevent an invasion of private rights by proceeding against the taxing officials as has been the case in a long line of decisions ever since *Osborn* vs. *Bank of the United States*, 22 U. S. 738 (1824), but instead the Trustee has proceeded directly against the State. We submit the petition of August 14th on its face constitutes a suit against the State and, since there had been no consent, the Bankruptcy Court is without jurisdiction to entertain the said petition.

In conclusion of this point, we respectfully urge that for the reasons above stated the Bankruptcy Court did not obtain jurisdiction to make in a summary manner the determinations sought by the petition of August 14th with respect to claimed rights under the terms of the Settlement Acts.

POINT X.

Regardless of the power of the Bankruptcy Court to undertake the consideration of the questions posed by the petition of August 14th, the Bankruptcy Court in the exercise of a nice discretion should refer the matters to the State Courts.

If all of the above questions are answered adversely to the State, nevertheless the Bankruptcy Court should not entertain jurisdiction in the instant case but should refer the matter to the State courts for determination.

We have shown that the Circuit Court of Appeals has already held that the Bankruptcy Court in the exercise of a nice discretion should not have considered the question of the constitutionality of the Settlement Acts. The matter having already been before the Bankruptcy Court, it became of even greater urgency that the said Bankruptcy Court should refuse to take jurisdiction to decide other questions of State law having to do with the constitutionality or applicability of the said Settlement Acts.

In this connection we call attention to the claim of the Petitioner that, under the law of the State of New Jersey, a person may acquire rights under an unconstitutional statute prior to the determination of unconstitutionality. Several cases are cited to support this contention at page 75 of Petitioner's brief. In *Allison* vs. *Corker* 67 N. J. L. 596 (E. & A. 1902), the Court was dealing with a formal defect in the legislative procedure. There was nothing inherently vicious in the subject matter of the Act. *Attorney General* vs. *McGuiness* 78 N. J. L. 346, (E. & A. 1910) had to do with the manner of adopting the Civil Service Act. The question was procedure. There was nothing inherently vicious in the subject matter of the Act. In *Eastwood* vs. *Russell* 81 N. J. L. 672 (E. & A. 1911) the Court was dealing with a defective title to an Act. There was

nothing vicious in the subject matter of the Act. *In re Public Utility Board* 83 N. J. L. 303 (S. Ct. 1912) likewise had to do with the title to an Act. There was nothing vicious in the subject matter of the Act.

But we are not concerned here with a matter of procedure. We are concerned with an Act purporting to do something inherently vicious—an Act purporting to make a gift to a corporation in direct violation of Article I, section 20 of the State Constitution which provides:

> "No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association, or corporation whatsoever."

If the Petitioner's contentions are upheld then the provision means nothing. Any legislature at any time could make a prohibited gift and, if the matter was consummated before the public became aware of what was going on, the gift would be constitutional. Not so easily may the Constitution be thwarted. As said by the Supreme Court concerning an Act inherently vicious in *Gimbel* vs. *Peabody, supra, 577*:

> "The argument that the prosecutor is in laches because large expenditures have been made are without merit. Those who can read can understand the constitutional provisions of this State, and if they choose to expend their money in defiance of the clear mandate of the people, they must take the consequences. Time may not inure to the advantage of those who choose to flout the Constitution of the State."

The Court of Errors and Appeals had the same statute before it in *Hyman* vs. *Long Branch Kennel Club* 115 N. J. L. 123 (1935). The Court below in that case had believed himself to be controlled by *Lang* vs. *Bayonne* 74 N. J. L. 455 and had held the Act to be effective prior to an adjudi-

cation of unconstitutionality notwithstanding, to use the words of the Court of Errors and Appeals (pg. 124):

> "that Judge Lawrence considered the Acts of 1933 and 1934 to be in flat defiance of the Constitution * * *."

The Court then said that the Acts were in flat defiance of the Constitution. It went on to hold that the *Lang* case did not embrace an Act the subject matter of which was in violation of the Constitution and that the Act in question was unconstitutional from the beginning. So that the law today in New Jersey is that an Act which violates the Constitution with respect to subject matter is void ab initio.

But even if the law were not so clear, nevertheless since the New Jersey Courts have already spoken as to the constitutionality of the Settlement Acts, the question of the time when their determination should take effect clearly comes within the rule of the *Spector* case and should be referred to the State Courts. This is particularly so in the instant case by reason of the fact that the fiscal officers of the State are permanently enjoined from accepting any payment pursuant to the terms of the said Settlement Acts.

In the *Spector Motor Co.* vs. *McLaughlin, supra,* case, this Court of its own motion held that matters of local law should be not decided by the Federal courts. This Court said (pg. 105):

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we

have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. (Citing cases.) Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication."

See also *Thompson* vs. *Magnolia Petroleum Co.*, 309 U. S., 478 (1939).

We respectfully urge that under no circumstances should the Bankruptcy Court have undertaken consideration of the petition of August 14th but, even though there otherwise might be jurisdiction, the questions presented by such petition having to do with the constitutionality of the Settlement Acts should have been referred to the State courts.

POINT XI.

The petitioner had ample time to intervene in the State Court proceedings.

We pointed out above that the Circuit Court of Appeals reversed Order No. 163 on May 27, 1943, which was prior to the Chancery Court's determination in *Wilentz* vs. *Hendrickson*, 133 N. J. Eq. 447, and more than one year prior to the final determination by the Court of Errors and Appeals in that case.

The Petitioner knew that the matter was before the State Courts. He knew those Courts were dealing with one question, involving one set of facts and one group of companies who had concertedly resisted payment of taxes.

With full knowledge of the Circuit Court's views concerning the appropriate relationship that should exist between the Federal and State authorities functioning as a

harmonious whole, the petitioner elected to do nothing. It did not intervene in the State proceedings notwithstanding they were being prosecuted by the State's highest legal officer.

Courts of bankruptcy are essentially Courts of equity. *Pepper* vs. *Litton, supra; Prudence Realization Corp.* vs. *Geist, supra.* Equity aids the vigilant. *Waller* vs. *Texas R. Co.*, 245 U. S. 398 (1918). *Baker* vs. *Cummings*, 169 U. S. 189 (1898). The Petitioner in the instant case did not display that vigilance that would give him a standing before this Court to claim equity. He preferred instead to await the outcome of the litigation in the State Courts without his intervention, thus to be in a position to claim the benefits if the results were favorable—to deny its applicability if it should be adverse. We respectfully urge that the petitioner was in laches and having bided his time while the New Jersey courts rendered the decisions in the said *Wilentz* vs. *Hendrickson* case, *supra*, may not be heard to say that the questions contained in that case are still open.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that the judgment of the Circuit Court of Appeals reversing Order No. 271 should be affirmed.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of the New Jersey Tax Act under which the 1932 to 1939 taxes were assessed.

R. S. 54:20–1:

"All the property of a railroad or canal company not used for railroad or canal purposes shall be assessed and taxed by the same assessors, in the same manner and at the same rate as the taxable property of other owners in the same taxing district."

R. S. 54:20–2:

"All property of a railroad or canal company used for railroad or canal purposes shall be assessed and taxed by the state tax commissioner in the manner provided in chapters 19 to 29 of this title (§ 54:19–1 et seq.), and the tax so imposed shall be in lieu of all other taxation upon property so subject to taxation."

R. S. 54:22–1:

"The state tax commissioner shall sit at Trenton on the first Tuesday of March in each year, and as often during the year and at such places as his duties may require for the purpose of ascertaining the true value, as of the first day of January preceding, of all property used for railroad or canal purposes of each railroad and of each canal company in this state, including its franchises, and he shall, in such ascertainment, ascertain:

I. The length and value of the main stem of each railroad, and of the waterway of each canal and the length of such main stem and waterway in each taxing district;

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this state, including the roadbed (other than main stem), waterways, reservoirs, tracks, buildings, water tanks, waterworks, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and of each canal company;

IV. The value of the remaining property, including the franchise. The commissioner shall complete his valuations by the first day of November following and on or before December tenth next following he shall serve upon the treasurer of each railroad and canal company or leave at his office a statement of the assessed valuation of the property of such company in the state and of the separate valuation of the property of such company in each taxing district."

R. S. 54:23-1:

"On or before March first in each year, every company running, operating or constructing a railroad or canal in this state shall return to the state tax commissioner statements or schedules showing its property as it existed on the first day of January preceding. The statement shall show: * * *"

R. S. 54:23-4:

"If a person or corporation running, operating or constructing a railroad or canal shall willfully neglect to make returns as required by this chapter, he or it shall forfeit as a penalty not more than ten thousand dollars for each offense, to be assessed by the jury. The penalty shall be recovered by an action at law in the supreme court brought in the name of the state and shall be paid into the state treasury. The state tax commis-

sioner shall certify any such default to the attorney general, who shall prosecute the action for the penalty."

R. S. 54:24–11:

"The entire amount of tax derived from the assessment of property described in subdivision II of section 54:22–1 of this title shall be allotted to and paid over to the local taxing districts through which the railroads or canals run, giving to each district the total amount of tax that may be so derived from such property of each railroad or canal company therein."

R. S. 54:26–1:

"On the first Monday of July after the filing of the returns the commissioner shall sit at the state house in Trenton, and shall give a hearing to all companies interested, touching the valuation and assessment of their property. He may adjourn from day to day, and may, if he sees fit, require all arguments and communications to be presented in writing. When the first Monday in July shall fall on the fourth or fifth day of the month, the meeting shall be held on the first Tuesday of July. All parties interested shall take notice of this hearing."

R. S. 54:26–2:

"The state tax commissioner shall sit on the second Monday of January in each year at the state house, Trenton, for the purpose of reviewing his assessments under chapters 19 to 29 of this title (§ 54:19–1 et seq.), made as of January first of the previous year, and may adjourn from time to time till he shall have finished the hearings."

R. S. 54:26-7:

"Any railroad or canal company or the attorney general on behalf of the state or, in respect to second-class property, the authorities of the taxing district, desiring to contest the final determination of the state tax commissioner under sections 54:26-2 to 54:26-5 of this title, or the validity or amount of the tax levied under chapters 19 to 29 of this title (§ 54:19-1 et seq.), or any railroad or canal company or the attorney general on behalf of the State and of the taxing districts claiming that there has been illegal discrimination in the assessment of any property or in the levying or imposing of the tax thereon under said chapters 19 to 29, or that there has been illegal discrimination in the assessment of property under said chapters 19 to 29 as compared with the assessment of property generally under chapter 4 of this title (§ 54:4-1 et seq.), may, on or before the third Monday of June following the levying or imposing of the tax, file a written complaint with the state board of tax appeals, specifying the grounds of complaint and the relief sought, which shall be in such form and contain such further information as may be from time to time prescribed by the rules of the state board of tax appeals for the better understanding and determination of the complaint."

R. S. 54:26-11:

"If a railroad or canal company, or, the attorney general on behalf of the state or, in respect to second-class property, if the authorities of any taxing district shall desire to contest the final determination of the state board of tax appeals, such contest shall be made by certiorari, provided the application therefor shall be made within three months from the date of the certification to the state tax commissioner of the final determination of the state board of tax appeals."

R. S. 54:27-1:

"The state tax commissioner shall certify and report to the comptroller on or before the first day of June following his completion of valuations, and within ten days thereafter serve upon the treasurer of each company or leave at his office, a statement of the assessed valuation of the property of such company in the state, and of the separate valuation of property in each taxing district, as made by him, the amount of tax payable by such company with respect to its property separately valued in each taxing district, the aggregate assessed valuation and the total tax levied upon each company. The statement shall be made separately for each company, and as to the property separately valued, shall be arranged by taxing districts in such manner as to be of easy reference, and shall be recorded in books in the office of the state comptroller, to be provided by him for that purpose, and shall be public records subject to public inspection. The failure to serve the notice herein required upon the company shall not invalidate any tax assessed or affect any lien created by chapters 19 to 29 of this title (§ 54:19-1 et seq.)."

R. S. 54:27-2:

"The amount of tax payable by each company, as shown by the statement, shall be due and payable into the state treasury on any day between said June first and December first following. All payments shall be made to the state treasurer."

R. S. 54:27-4:

"If the taxes of any company, or any portion thereof, remain unpaid on December first following the levying thereof, the company shall be considered in default, and such taxes, or the unpaid portion thereof, shall

thenceforth bear interest at the rate of one per cent for each month until paid, notwithstanding the prosecution of a writ of certiorari or other remedy. These taxes shall be a lien paramount to all other liens upon all the lands and tangible property and franchises of the company in this state. The lien shall take effect on June first of the year in which the tax is payable and shall be a debt due from the company to the state on that date for which an action at law or suit in equity may be maintained, and shall be a preferred debt in case of insolvency. These remedies are in addition to the special proceedings provided for in chapters 19 to 29 of this title (§ 54:19–1 et seq.)."

R. S. 54:27–6:

"If a company shall be in default under chapters 19 to 29 of this title (§ 54:19–1 et seq.), in the payment of the state tax aforesaid, a person having an interest in a mortgage or other lien on its franchises or property, may pay the state treasurer the amount of such state tax and the interest due thereon, and receive from the treasurer a certificate of such payment. He shall thereupon be entitled to be repaid the amount of the tax and interest thereon at the rate of twelve per cent per annum out of the first proceeds of any sale of the franchises or property of the company, and the tax and interest thereon shall continue a lien on the franchise and property of the company for the benefit of the holder of or person interested in the mortgage or lien until paid by the company from the sale of its franchises or property. If proceedings have been taken by the attorney general to enforce the payment of the tax and interest thereon, the holder of or person interested in a mortgage or lien paying the tax and interest shall pay such additional amount as a justice of the supreme court shall certify to be proper and reasonable for the

expenses and services of the proceedings as far as they have progressed for the collection of the tax and interest thereon."

R. S. 54:27-7:

"Any railroad or canal company against which a tax has been or shall be levied may pay the same into the state treasury, notwithstanding litigation may be pending as to the validity of the whole or any part of said tax, and if it shall be determined in any litigation that the whole or any part of the tax so paid has been unlawfully assessed or imposed, the state treasurer shall give credit for such overpayment to the corporation so paying, upon the taxes next legally levied and payable into the state treasury subsequent to the determination of any such litigation."

R. S. 54:28-1:

"If a tax levied and assessed under the provisions of chapters 19 to 29 of this title (§ 54:19-1 et seq.) shall remain unpaid in whole or in part for ten days after the expiration of the time limited for the payment thereof, the attorney general shall apply forthwith to a justice of the supreme court for an order that the tax together with the interest due thereon and a reasonable sum to be certified by the justice to be paid for the expense of the proceeding, shall be made a record of the supreme court, and judgment shall be entered therefor in the name of the state as plaintiff against the company and the mortgagee or other creditor, as defendants. The order shall be made upon the production of a certified copy from the comptroller of the certificate and report of the state tax commissioner on file in his office, and of the certificate of the comptroller that the tax has not been paid."

R. S. 54:28–2:

"The attorney general shall apply for an order that execution forthwith issue on the judgment, directed to a master of the court of chancery, to be named by the justice in the order."

R. S. 54:28–4:

"If a certiorari shall have been allowed, on application of the attorney general the orders referred to in sections 54:28–1 and 54:28–2 of this title shall be made and enforced without prejudice to the right of the state to enforce the payment of any additional amount of tax which may be imposed and to apply for a second judgment therefor. If a certiorari shall have been allowed on application of a company or mortgagee or other creditor taxed and the tax shall have been reduced after the payment thereof, the excess shall be repaid by the state upon the order of the court, and the state comptroller shall, upon such order, issue his warrant for such payment accordingly."

R. S. 54:28–5:

"The master in chancery to whom the execution shall be directed shall sell all the franchise, real estate and rolling stock and property of the company, the estate and interest of any mortgagee and the debt due to any creditor for which a deduction has been allowed, or so much thereof as may be necessary to make the amount due on the tax judgment and usual execution fees. The execution shall describe the property or debt aforesaid whereon the tax was assessed, and shall direct the sale thereof, and, generally, the sale of all other property of the company or person. The sale shall pass the absolute title to the franchise and property and debt aforesaid so sold, on which the tax was assessed or became a lien, free and clear of all liens,

encumbrances and trusts of every nature, except taxes subsequently levied. In case of the sale of the estate and interest of a mortgagee it shall pass as well such estate as the interest of all bondholders and cestuis que trustent for whose benefit the mortgage may have been given or may be held in trust or otherwise. As to any other property of the company or persons, the judgment and execution shall constitute or become liens in the same manner and to the same extent as other judgments and executions of the supreme court. The sale, advertisements and proceedings under such executions shall be the same as under other executions of the supreme court."

Present New Jersey Tax Act.

R. S. 54:29A–74:

"All other State and local taxes of or upon franchises or property used for railroad purposes, which may have been assessed for the first year in which this act becomes effective upon any taxpayer subject to taxation hereunder prior to the enactment of this act, shall abate and be canceled of record as of the effective date hereof. This act shall be construed as a revision of chapters nineteen through twenty-nine, inclusive, of Title 54 of the Revised Statutes, and nothing herein shall be construed to affect any pending litigation, nor to repeal, abate, cancel, cause to lapse or otherwise affect in any manner any assessment or the lien or obligation to pay any taxes heretofore assessed to any taxpayer, or the legal authority to collect taxes, interest and penalties which have accrued under any provision of law repealed by this act, or under any other law, except as specifically provided in this act, or to affect the right of the State Tax Commissioner to assess omitted property, and apportion the tax so assessed, for any year prior to one thousand nine hundred and

forty-one, according to the classifications and at the rates prescribed in the chapters aforesaid. Nor shall this act affect in any manner any distribution allotment or apportionment of tax receipts made or required to be made under any provision of law repealed by this act."

Pertinent Sections of the Bankruptcy Act.

Section 17 (11 U. S. C. A. Sect. 35) in part:

"a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States, or any State, county, district, or municipality;"

Section 57 (11 U. S. C. A. Sect. 93) in part:

"(e) Claims of secured creditors and those who have priority may be temporarily allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be thus temporarily allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

(j) Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

(n) Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner pro-

vided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: * * *"

Section 64 (11 U. S. C. A. Sect. 104) in part:

"a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether

or not selling exclusively for the bankrupt; * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court:"

Section 67 (11 U. S. C. A. Sect. 107) in part:

"b. The provisions of section 96 of this title to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter 10, 11, 12, or 13 of this title, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter 10, 11, 12, or 13 of this title, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or

to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, or distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 104 of this title, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 104 of this title."

Section 77 (11 U. S. C. A. Sect. 205) in part:

"(a) * * * Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them * * * (b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; * * * The term 'securities' shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term 'stockholders' shall include the holders of voting-trust certificates. The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this

Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.'

The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. * * * (c) * * * (2) * * * Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe. * * * (e) * * * "If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission. * * * *Provided*

further, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed."

11 U. S. C. A. Sect. 506, in part:

"(1) 'claims' shall include all claims of whatever character against a debtor or its property, except stock, whether or not such claims are provable under section 103 of this title and whether secured or unsecured, liquidated or unliquidated, fixed or contingent; • • •

(4) 'creditor' shall mean the holder of any claim;

(5) 'debtor' shall mean a corporation by or against which a petition has been filed under this chapter;

(6) 'debts' shall include all claims; • • • "

11 U. S. C. A. Sect. 599:

"If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any

proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided*, That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed. July 1, 1898, c. 541, § 199, as added June 22, 1938, c. 575, § 1, 52 Stat. 893."

California Constitution, Article XII, Section 13:

"[Loan of state credit] The State shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association, or corporation."

New Jersey Constitution, Article I, Paragraph 19:

"[Loan of local credit] No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation."

Article IV, Section VI, Paragraph 3:

"[Loan of state credit] The credit of the State shall not be directly or indirectly loaned in any case."

Ohio Constitution, Article VIII, Section 4:

"[Loan of state credit] The credit of the State shall not, in any manner, be given or loaned to, or in aid of,

any individual, association or corporation whatever; nor shall the State ever hereafter become a joint owner, or stockholder, in any company or association in this State, or elsewhere, formed for any purpose whatever."

Article VIII, Section 6:

"[Loan of municipal credit] No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this State or doing any insurance business in this State for profit."

Pennsylvania Constitution, Article IX, Section 6:

"[Loan of state credit] The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association, nor shall the Commonwealth become a joint owner or stockholder in any company, association or corporation."

Article IX, Section 7:

"[Loan of local credit] The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

Appendix

Mandate of the Circuit Court of Appeals in *Central Railroad Company* vs. *Martin*, 115 F. (2d) 968.

"UNITED STATES OF AMERICA, *ss:*

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the District
[SEAL] *Court of the United States for the District of New Jersey*

GREETING:

WHEREAS, lately in the District Court of the United States for the District of New Jersey, before you or some of you, in a cause between Central Railroad Company of New Jersey, plaintiffs below (appellee) and J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey; Frank J. Murray, Comptroller of the State of New Jersey; William H. Albright, Treasurer of the State of New Jersey, and David T. Wilentz, Attorney-General of the State of New Jersey, defendants below (appellants)—No. 5184-1934—a judgment was entered in the said District Court on January 25, 1940, which judgment is of record in the office of the Clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal by defendants agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and forty, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and the cause is remanded to the said District Court with directions to dismiss the action. And that the said Appellants, J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey; Frank J. Murray, Comptroller of the State of New Jersey; William H. Albright, Treasurer of the State of New Jersey; and David T. Wilentz, Attorney-General of the State of New Jersey, recover against the said Appellee, The Central Railroad Company of N. J., in the sum of

EIGHTY and 35/100 DOLLARS ($80.35)

for their costs herein expended, and have execution therefor.

Philadelphia,
November 27, 1940.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 12th day of May, in the year of our Lord one thousand and nine hundred and forty-one.

COSTS OF Appellants, J. H. Thayer Martin, etc., et al.

Clerk	$60.35
Printing Record ...	$
Attorney	$20.00
	$80.35

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit."

Appendix

Modification of Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey.

"IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Debtor.*	In Proceedings for the Reorganization of a Railroad. No. 29778.

Modification of Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims filed by the State of New Jersey.

Honorable Augustus C. Studer, Jr., Special Master, United States District Court:

DEAR SIR:

1. Prior to and at the time of the filing of the petition in bankruptcy herein the Debtor had contested and was contesting in this Court, sitting as a court of equity, the tax assessments that had been entered against it under the Railroad Tax Act of the State of New Jersey in and for each of the tax years 1934, 1935 and 1936.

2. The Court enjoined the collection of more than 70% of the taxes levied upon the basis of each of said assessments for the years 1934, 1935 and 1936 until the taxing authorities of New Jersey should make new assessments according to law. *Central R. Co. of New Jersey* vs. *Martin*, 30 F. Supp. 41.

3. On appeal the United States Circuit Court of Appeals for the Third Circuit reversed said injunctive decree and

remanded with directions to the District Court to dismiss the actions. *Central R. Co. of New Jersey* vs. *Martin*, 115 F. (2d) 968.

4. The mandates of the Circuit Court in said actions were issued to this Court on May 12, 1941.

5. On November 15, 1945, said Circuit Court filed its opinion in Cases No. 8861 and 8889, the latter of which was an appeal from Order No. 271 of this bankruptcy court in these proceedings. The Circuit Court has deferred the issuance of its mandates in said cases pending consideration on the part of the undersigned Trustees as to the necessity and advisability of an application for rehearing, clarification or other relief touching various matters contained in said opinion bearing on those defenses pleaded in the alternative by the Trustees with respect to the claims of the State of New Jersey for the years subsequent to 1936. However, entirely apart from the foregoing considerations, it is evident from said opinion of November 15, 1945, that the mandates of the Circuit Court of Appeals issued as aforesaid on May 12, 1941, were intended to govern and control the liability of the Debtor's estate to the State of New Jersey for the principal of the taxes levied against the Debtor for the years 1934, 1935 and 1936. Accordingly, the undersigned Trustees of the Debtor hereby amend Paragraph 5 of their Supplemental Objections, filed herein on November 22, 1944, so as to eliminate from said Paragraph 5 all references to the years 1934, 1935 and 1936 and the related amounts.

SHELTON PITNEY and WALTER P. GARDNER,

Trustees of the property of The Central Railroad Company of New Jersey, Debtor,

By /s/ SHELTON PITNEY,

SHELTON PITNEY,

Trustee."

Dated: December 27, 1945.

Appendix

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Debtor.*	In Proceedings for the Reorganization of a Railroad. No. 29778.

Petition of Trustees for Order No. 303 Authorizing Them to Pay Balances Claimed by the State of New Jersey on Account of 1941 Taxes.

To the Honorable Guy L. Fake, Judge of the District Court of the United States for the District of New Jersey:

The petition of Shelton Pitney and Walter P. Gardner, as Trustees of the property of The Central Railroad Company of New Jersey, Debtor, respectfully shows:

1. On or about May 31, 1941 the State Tax Commissioner of the State of New Jersey assessed against your petitioners as Trustees of the Debtor an *ad valorem* tax of $3,369,759.34 for the tax year 1941. In assessing said tax the Commissioner acted under the provisions of the Railroad Tax Act then in force, viz., R.S.N.J. 54:19–1 *et seq.*

2. On June 16, 1941 your petitioners appealed from said assessment of $3,369,759.34 to the State Board of Tax Appeals, pursuant to and as authorized by R.S.N.J. 54:26–7.

3. On August 11, 1941 your petitioners waived said appeal and all right of appeal from said assessment pur-

suant to Order No. 123 in this cause and the provisions of Chapter 290 of the Laws of New Jersey of 1941 which required any railway taxpayer electing to comply with said Chapter to waive "any and all rights to contest the legality or amount of any assessment made prior to December first, one thousand nine hundred and forty-one" (L. 1941, c. 290, p. 771, Sec. 8).

4. On or about November 5, 1941, pursuant to the Railroad Tax Law of 1941 (L. 1941, c. 291, p. 773), the State Tax Commissioner re-computed and re-assessed petitioners' 1941 *ad valorem* tax at $2,010,218.76. On December 1, 1941 your petitioners duly paid to the State said tax of $2,010,218.76. On June 15, 1942 your petitioners also paid to the State a 1941 franchise tax of $239,749.80, which was assessed by the State on or about May 21, 1942 pursuant to Chapter 169 of the Laws of New Jersey of 1942 (L. 1942, c. 169, p. 513), and filed the further or additional waiver and other documents required by Chapter 241 of the Laws of New Jersey of 1942 (L. 1942, c. 241, pp. 656-7, secs. 8 and 9).

5. On August 29, 1945 the New Jersey Supreme Court filed an opinion in certain cases argued on January 19, 1944 entitled "*City of Jersey City* v. *State Board of Tax Appeals et al.*" (not yet reported). Said opinion holds, in substance, that the Railroad Tax Law of 1941 was unconstitutional with respect to the tax year 1941, in that it violated Paragraph 20 of Article I of the Constitution of the State of New Jersey by reducing the amount of the 1941 railroad taxes as originally assessed under R.S.N.J. 54:19–1 *et seq.* at the "average tax rate" of $4.818 on each $100 of valuation, through the substitution of a 3% tax rate. A rule for judgment was entered on said opinion on October 16, 1945 which provided "that all of the assessments of property and franchise excise taxes made by the State Tax Commissioner for the year 1941, under the Railroad Tax Law of 1941 (Chapter 291, as amended by

Chapter 169 of the Laws of 1942), are null and void, and that the same be and they herewith are set aside and for nothing holden" and "that all of the assessments of railroad property made by the State Tax Commissioner for the year 1941, under and pursuant to the Revised Statutes of 1937, are, and have been since the making thereof, valid, lawful and subsisting obligations of the taxpayers assessed", but "subject to credit in favor of such taxpayers against said obligations for any sums paid on account of property or franchise excise tax assessments purportedly made for the year 1941 under and pursuant to the Railroad Tax Law of 1941 (Chapter 291, as amended by Chapter 169 of the Laws of 1942)".

6. Petitioners show that said decision and rule for judgment purport to reinstate said original 1941 tax assessment of $3,369,759.34, with credit for the taxes billed and paid as aforesaid. The State of New Jersey claims on the basis of said decision that the unpaid portion of said original 1941 tax assessment became "due" on December 1, 1941 and was thereafter "delinquent" and therefore has been and is bearing interest at the rate of 1% per month computed from said date (L. 1941, c. 291, p. 791, Sec. 53).

7. Petitioners show that if they do not now pay to the State the balance claimed by it on account of the 1941 *ad valorem* tax as originally assessed, with interest at the statutory rate of 1% per month from December 1, 1941, unless said decision and rule for judgment are reversed by the Court of Errors and Appeals, it may be contended that interest has continued to accrue on said balance at said rate and that petitioners have contested the amount or validity of said original assessment on its merits in contravention of their aforementioned waivers, the requirements of the statute (L. 1942, c. 241, p. 655, Sec. 6; L. 1941, c. 290, p. 771, Sec. 8), and the orders of this Court under which they so waived.

8. Your petitioners are confronted with a similar problem in respect of each of two subsidiary companies of the Debtor, viz., The Ogden Mine Railroad Company and The Dover & Rockaway Railroad Company, and for the reasons hereinabove explained petitioners must now pay smaller balances similarly claimed by the State on account of 1941 *ad valorem* taxes as originally assessed to your petitioners in respect of the railroad properties of said subsidiary companies.

Your petitioners therefore pray for the aid and instructions of this Court in the premises and for authority to make payment of said alleged unpaid balances of the 1941 tax assessments as originally levied against your petitioners in respect of the railroad properties of the Debtor, said The Ogden Mine Railroad Company and said The Dover & Rockaway Railroad Company, together with interest thereon at the rate of 1% per month from December 1, 1941, without prejudice, however, to petitioners' right under the provisions of Section 49 of Chapter 291 of the Laws of New Jersey of 1941 (L. 1941, p. 790) to have credited said principal and interest on account of any future taxes that may be due to the State of New Jersey, or their right to other redress, in the event the Court of Errors and Appeals reverses said decision and rule for judgment; and that your petitioners may be further authorized to take all such other, further and incidental steps as may be necessary to protect the Debtor's estate in the premises.

And your petitioners will ever pray, etc.

SHELTON PITNEY
WALTER P. GARDNER
As Trustees of the property of
The Central Railroad Company
of New Jersey,
By SHELTON PITNEY

Dated: November 14, 1945.
Filed: November 14, 1945.

(Verification dated November 14, 1945 omitted in printing.)

Appendix

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Debtor.*	In Proceedings for the Reorganization of a Railroad. No. 29778.

Order No. 303, Authorizing Trustees to Pay Balances Claimed by the State of New Jersey on Account of 1941 Taxes.

Upon reading and filing the petition of the Trustees, duly verified on the 14th day of November, 1945, touching the claims of the State of New Jersey for unpaid balances of the 1941 tax assessments as originally levied against the Trustees in respect of the railroad properties of the Debtor, The Ogden Mine Railroad Company and The Dover & Rockaway Railroad Company, said claims being founded upon an opinion filed by the New Jersey Supreme Court on August 29, 1945 and rule for judgment entered thereon on October 16, 1945, in certain cases entitled *"City of Jersey City* vs. *State Board of Tax Appeals, et al."*; and it appearing to the Court that the prayer of the Trustees' petition should be granted:

It is, on this 14th day of November, 1945, ORDERED that the Trustees of the Debtor be and they are hereby authorized and directed to pay to the State of New Jersey the

unpaid balances of the 1941 tax assessments as originally levied against the Trustees in respect of the railroad properties of the Debtor, said The Ogden Mine Railroad Company and said The Dover & Rockaway Railroad Company, together with interest thereon at the rate of 1% per month from December 1, 1941, without prejudice, however, to the petitioners' right under the provisions of Section 49 of Chapter 291 of the Laws of New Jersey of 1941 (L. 1941, p. 790) to have credited said principal and interest on account of any future taxes that may be due to the State of New Jersey, or their right to other redress, in the event the Court of Errors and Appeals reverses said decision and rule for judgment.

GUY L. FAKE
U. S. D. J.

Filed November 14, 1945.